

Wiers International Trucks, Inc. and Great Lakes International Trucks, LLC d/b/a Wiers International Trucks, joint employers and/or a single employer, and its successor Great Lakes International Trucks, LLC and International Union of Operating Engineers, Local 150 a/w International Union of Operating Engineers, AFL-CIO.
Cases 25–CA–30375 and 25–RC–10389

October 31, 2008

DECISION, ORDER, AND DIRECTION

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

On July 23, 2008, Administrative Law Judge Paul Bogas issued the attached decision. Respondent Great Lakes International Trucks, LLC (Respondent Great Lakes) filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the General Counsel filed cross-exceptions and a supporting brief.¹

The National Labor Relations Board² has considered the decision³ and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,⁴ and conclusions⁵ and to adopt the recommended Order.⁶

¹ Weirs International Trucks, Inc. is not a party to this proceeding, except to the extent it is alleged to be a single employer and joint employer with Respondent Great Lakes.

² Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

³ In adopting the judge's findings that Respondent Great Lakes unlawfully transferred employees Timothy Burelison, John Bussey, and Eric Reamer from its Elkhart, Indiana facility, we do not rely on his statement that the Respondent offered no explanation for transferring employee Gary Morton to that facility when it allegedly did not have enough work for service technicians already employed there. Supervisor Drew Hettich testified, without contradiction, that Morton was transferred to the facility in order to train less experienced service technicians. We nevertheless adopt the judge's findings that the transfers of Burelison, Bussey, and Reamer were discriminatorily motivated, for the other reasons he cited.

⁴ Respondent Great Lakes has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

Respondent Great Lakes also argues that the two-member Board does not constitute a quorum as required by statute and, therefore, the

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that Respondent Great Lakes International Trucks, LLC, Elkhart and South Bend, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 25 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of Timothy Burelison, John Bussey, and Eric Reamer. The Regional Director shall then prepare and serve on the parties a revised tally of ballots and issue the appropriate certification, identifying Great Lakes International Trucks, LLC as the employing entity.

Derek A. Johnson, Esq., for the General Counsel.

Steve Shoup, Esq. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.), of Indianapolis, Indiana, for Respondent Great Lakes International Trucks, LLC.

Bryan P. Diemer, Esq. and Karl E. Masters, Esq., of Countryside, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard these consolidated unfair labor practices and representation cases in Elkhart, Indiana, on March 4 and 5, 2008. The International Union of Operating Engineers 150, a/w International Union of Operating Engineers, AFL-CIO (the Union or the Charging Party) filed the original charge on June 26, 2007, and amended

Board has no authority to issue a ruling in this case. That argument is without merit, for the reasons stated in fn. 2.

⁵ There are no exceptions to the judge's findings that Respondent Great Lakes violated Sec. 8(a)(1) by coercively interrogating employees, and threatening them with more onerous conditions and closure of the facility if they selected the Union. There are also no exceptions to the judge's finding that Respondent Great Lakes violated Sec. 8(a)(1) and (3) by implementing a new benefit for the purpose of discouraging union support.

In adopting the judge's determination that Respondent Great Lakes and Respondent Wiers IT operated neither as a single employer nor as joint employers at the Wiers IT-Plymouth, Indiana location, we rely particularly upon the absence of evidence that Respondent Great Lakes took part in any aspect of the operation of the Plymouth facility. The record is clear that Respondent Great Lakes had no role whatsoever in the management, operation, or control of any Respondent Wiers IT-owned facility. In these circumstances, we agree that Respondent Great Lakes should not be held liable for unfair labor practices alleged to have occurred at Respondent Wiers IT's Plymouth facility.

⁶ The General Counsel seeks compound interest computed on a quarterly basis for any monetary amounts owing to the discriminatees. Having duly considered the matter, we are not prepared at this time to deviate from our current practice of assessing simple interest. See, e.g., *Glen Rock Ham*, 352 NLRB No. 69, slip op. at fn. 1 (2008), citing *Rogers Corp.*, 344 NLRB 504 (2005).

charges on August 24 and September 28, 2007. The Regional Director for Region 25 of the National Labor Relations Board (the Board) issued the unfair labor practice complaint and notice of hearing on November 30, 2007, alleging that the Respondents had committed various unfair labor practices in advance of a representation election that was held on June 19, 2007, for a unit of employees at a truck dealership in Elkhart, Indiana. The complaint alleges that the Respondents violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: coercively interrogating employees, soliciting grievances from employees, promising benefits to employees, threatening employees with plant closure and reduced terms and conditions of employment, and prohibiting employees from discussing the Union. In addition, the complaint alleges that the Respondents violated Section 8(a)(1) and (3) of the Act by beginning to provide a training and certification benefit in order to discourage employees from supporting the Union.

The complaint further alleges that the Respondents violated Section 8(a)(1) and (3) of the Act by discriminatorily transferring three prounion employees from the Elkhart facility, and subsequently disciplining and terminating one of those employees, because the employees engaged in union and other protected concerted activities. It is also alleged that two of the transfers violated Section 8(a)(1) and (4) of the Act because those transfers were based on the employees' participation as union witnesses at a preelection hearing.

Seven ballots were cast at the representation election on June 19—two in favor of the Union, two against the Union, and three determinative ballots that were challenged by the employer. The challenged ballots were cast by the same three employees who the unfair labor practices complaint alleges the employer unlawfully transferred, and in one case, unlawfully discharged. The employer contends that the three determinative ballots should not be counted because the employees who cast them were no longer working at the Elkhart facility at the time of the election. The Union counters that the challenges should be overruled because the employer transferred and discharged the employees for reasons that violated the Act.

On December 5, 2007, the Regional Director issued an order directing a consolidated hearing on the alleged unfair labor practices, the three ballot challenges, and determination of the name of the employing entity.

Shortly before the hearing, one of the named Respondents—Wiers International Trucks, Inc. (Wiers IT)—reached a settlement with the Region regarding both the unfair labor practices case and the representation case. At the start of the hearing, the General Counsel stated that it was proceeding only against Great Lakes International Trucks, LLC (Respondent Great Lakes, the Respondent, or the Company), not Wiers IT.¹ Although counsel for Wiers IT had participated in prehearing conferences prior to reaching the settlement, no representative entered an appearance on behalf of Wiers IT at the hearing.

¹ Counsel for the General Counsel stated, “that Wiers International Trucks, Inc., as an entity has settled with the Region,” and “as regards . . . the proceedings here today we’re only proceeding against Great Lakes and whatever entity that constituted at the time in terms of the Elkhart facility that’s at issue here.” Tr. 8; see also GC Br. 13 fn. 4.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent Great Lakes, and the Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Great Lakes sells and services trucks at its facilities in Elkhart and South Bend, Indiana. In conducting these activities during the 12-months preceding issuance of the complaint, Respondent Great Lakes sold and shipped from its Indiana facilities goods valued in excess of \$50,000 directly to points outside the State of Indiana, and received at those facilities goods valued in excess of \$50,000 directly from points outside the State of Indiana. Respondent Great Lakes admits,² and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. RESPONDENT GREAT LAKES AND ITS RELATIONSHIP TO WIERS IT

International Truck and Engine Corp. is a truck manufacturer that also owns dealerships where it sells and services its products. Respondent Great Lakes is an entity that International Truck and Engine created to purchase, operate, and/or sell four such dealerships. Those four dealerships are located in Elkhart, Indiana, South Bend, Indiana, Jackson, Michigan, and Kalamazoo, Michigan (the Great Lakes facilities). The Elkhart dealership became the subject of a union organizing campaign in 2007 and most of the allegations in the complaint involve that location.

Wiers IT is an independently owned dealer of International trucks that does business in the same general geographic region as Respondent Great Lakes. Wiers IT sells and services International trucks at three dealerships located in Lafayette, Logansport, and Plymouth, Indiana (the Wiers IT facilities).³ Its headquarters are located at the Plymouth facility. Thomas Wiers (T. Wiers) has, for at least 14 years, owned Wiers IT and serves as its president and chief executive officer. Drew Hetlich has been the director of parts and service for Wiers IT since August 2005.

At some point, T. Wiers became interested in purchasing the four Great Lakes dealerships. On February 24, 2006, T. Wiers entered into an agreement to purchase those dealerships from an entity that International Truck and Engine uses for selling dealerships to independent operators. That seller entity is International Dealcor Operations (International Dealcor). The

² At the start of trial, Respondent Great Lakes amended its answer to admit that it was, at all relevant times, a statutory employer. Tr.14–15. In its brief, Respondent Great Lakes concedes that it was the employer of all employees at the Elkhart facility from February 24, 2006, until July 13, 2007.

³ For convenience, and consistent with the suggestion of the General Counsel, I use the term “Great Lakes facilities” to refer to the Elkhart, Jackson, Kalamazoo, and South Bend locations, and the term “Wiers IT facilities” to refer to the Lafayette, Logansport, and Plymouth locations. (GC Br. 3 fn. 2.)

purchase agreement installed T. Wiers as president of Respondent Great Lakes. Under the agreement, T. Wiers did not acquire full ownership of Respondent Great Lakes. Rather, T. Wiers began with a six percent ownership interest in the Company and was entitled to purchase additional shares of Great Lakes from International Dealcor⁴ using bonuses that he could earn as president of Respondent Great Lakes. Under the purchase agreement, the board of managers of Great Lakes and/or International Dealcor had the absolute right to remove T. Wiers from his position as president of Respondent Great Lakes. In the event that T. Wiers was removed, his right to purchase Respondent Great Lakes would be extinguished. As is discussed below, subsequent to the time when the unfair labor practices are alleged to have occurred, the board of managers of Great Lakes and/or International Dealcor did, in fact, remove T. Wiers from his position as Great Lakes' president.

On the same day that T. Wiers and International Dealcor entered into the purchase agreement, they also entered into an agreement on bonuses, the stated purpose of which was to compensate T. Wiers, as president of Respondent Great Lakes, "in relation to the degree of his success in managing the business and affairs of [Respondent Great Lakes]." Under the agreement, T. Wiers promised that as president of Respondent Great Lakes, he would "devote 100 percent of his efforts to [Respondent Great Lakes'] business," and would "adhere to its business management and other policies, as determined from time to time by its Board of Managers." T. Wiers would receive a salary plus a bonus based on a percentage of Respondent Great Lakes' earnings. As with the purchase agreement, this document stated that the board of managers of Great Lakes and/or International Dealcor had the "absolute" right to terminate T. Wiers' service as president of Respondent Great Lakes. In addition to serving as president of Great Lakes, T. Wiers was made a member of Great Lakes' board of managers. A number of the approximately five other members of the Great Lakes board of managers were officials of International Truck and Engine and/or International Dealcor.

During the time that he was president of Respondent Great Lakes, T. Wiers had authority over day-to-day employment and labor relations at the Great Lakes facilities. He had the power to discipline employees, hire, and fire employees, transfer employees between locations, recommend wage rate changes, and direct employees in the performance of their duties.⁵ How-

ever, T. Wiers' authority regarding the making of management policy was limited. Pursuant to both the purchase agreement and the agreement on bonuses, T. Wiers was required to "adhere to [the Great Lakes'] business management and other policies" in the operation of the Great Lakes facilities. T. Wiers' authority as president of Great Lakes was also limited when it came to financial matters. He was required to obtain the approval of the Great Lakes board of managers for any expenditure at the Great Lakes facilities that exceeded \$10,000, and also consulted with the board of managers regarding other significant business decisions. In addition, he had to obtain approval before making adjustments of more than \$1000 to charges for warranty service to vehicles. Once a month, T. Wiers was required to make a report to the board of managers in which he summarized activities at the Great Lakes facilities and provided financial information. The record contains two examples of these reports, and in both T. Wiers discussed various personnel matters at the Great Lakes facilities, including, in general terms, his opposition to the union organizing campaign at the Elkhart facility. These reports do not make any mention of the Wiers IT facilities. Auditors for International Truck and Engine and/or Respondent Great Lakes would visit T. Wiers intermittently in order to verify that he was operating the Great Lakes facilities in accordance with Great Lakes' policies.

The record indicates that it was T. Wiers' ambition to make the four Great Lakes facilities part of Wiers IT. He testified that he was moving the four Great Lakes facilities and the three Wiers IT facilities "towards commonality in terms of several items." His plan was to "brand" the Great Lakes facilities with the Wiers name. Towards that end, he requested, and obtained, approval from the Great Lakes board of managers to begin using the Wiers name even when doing business at the Great Lakes facilities. On March 6, 2006, T. Wiers filed paperwork with the State of Michigan stating that Respondent Great Lakes would be transacting business under the assumed name "Wiers International Trucks." He filed the same type of paperwork with the State of Indiana. T. Wiers also began using Wiers IT signs, stationary, and business cards at the Great Lakes facilities. The record indicates that, for a period of time, the paycheck stubs for employees at the Great Lakes facilities carried the names of both Wiers IT and Respondent Great Lakes. However, the paycheck stubs in the record from the Wiers IT facilities carry only the name of Wiers IT.

T. Wiers also began to consolidate certain management and administrative functions. Hettich, who was the director of parts and service for the three Wiers IT facilities, also oversaw the four Great Lakes facilities during the relevant time period.⁶ The managers of the individual Great Lakes locations began reporting to Hettich, who, in turn, reported to T. Wiers. Hettich had authority to hire, train, and fire employees, and to recommend wage increases, at the Great Lakes facilities, as well as at the Wiers IT locations. He was also held responsible for the

⁴ International Dealcor owned the other 94 percent of the shares of Respondent Great Lakes.

⁵ In its answer, Respondent Great Lakes denied that T. Wiers was its agent or supervisor during the period when the violations at the Great Lakes facilities are alleged to have occurred. In its brief, however, Respondent Great Lakes concedes that T. Wiers was its agent during the relevant time period. R. Br. at 11. To the extent that Respondent Great Lakes may still be arguing that T. Wiers was not acting as its agent with respect to the specific conduct alleged to be unlawful because the Great Lakes board of managers did not authorize that conduct, the argument fails under Sec. 2(13) of the Act, which provides that "[i]n determining whether any person is acting as an 'agent' . . . the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling." See also *Braun Electric Co.*, 324 NLRB 1, 2-3 (1997) (company's president

acting as agent, despite company's argument that president's specific acts were outside his authority).

⁶ His title with Respondent Great Lakes was "district parts and service manager."

level of income generated by those facilities.⁷ The Great Lakes facilities and the Wiers IT facilities all submitted their payroll information to the same payroll clerk, who was located at the Wiers IT facility in Plymouth. That payroll clerk, in turn, submitted the information to an outside payroll company that actually issued employees' paychecks. During the period that the purchase agreement was in effect, the personnel files for employees of the Great Lakes facilities and the Wiers IT facilities were kept at the Wiers IT location in Plymouth. Sales paperwork from both the Great Lakes facilities and the Wiers IT facilities was processed by a Great Lakes employee who worked at the Great Lakes location in South Bend. There were two or more employees of Respondent Great Lakes who were stationed at the Wiers IT headquarters in Plymouth.

Despite the push towards "commonality" on "several items," the Great Lakes and Wiers IT facilities remained discrete entities in significant respects. No action was taken to re-incorporate the two companies as a single entity. Respondent Great Lakes never owned any portion of Wiers IT or its facilities, or had any authority over how T. Wiers operated the Wiers IT locations. In the operation of the Great Lakes facilities, on the other hand, T. Wiers was required by the purchase agreement to "adhere to [Great Lakes'] business management and other policies." T. Wiers testified that there was no plan to generally apply the Wiers IT policies at the Great Lakes facilities. Rather, he stated, "Wiers had some things that were in place" and "Great Lakes had some things that were in place." Over time, Respondent Great Lakes and Wiers IT adopted certain common policies and procedures that they determined were "best practices," but this was, according to T. Wiers, only done "to some degree." During much of the time that T. Wiers was president of both Respondent Great Lakes and Wiers IT, the Great Lakes facilities (including the Elkhart location) continued to use the Great Lakes' personnel handbook, while the Wiers IT facilities used a different, Wiers IT, handbook. It was not until April 2007—after the filing of the representation petition—that the Respondent began to distribute the Wiers IT handbook to employees at the Elkhart location. Even then, the Respondent was not shown to have withdrawn the Great Lakes personnel handbook.

The record shows that a bright line continued to exist between the finances of Wiers IT and Respondent Great Lakes, even after T. Wiers began using the Wiers name at the Great

Lakes facilities. Respondent Great Lakes had a bank account that was owned by Great Lakes and from which it paid employees at the four Great Lakes facilities. Wiers IT had a separate bank account that was owned by Wiers IT and which was used to pay employees of the three Wiers facilities. When an employee of a Great Lakes facility did work that benefited a Wiers IT facility, an invoice was created and Wiers IT reimbursed Respondent Great Lakes for the time spent by that employee on Wiers IT business. Likewise, when an employee of a Wiers IT facility performed work for a Great Lakes facility, Respondent Great Lakes would reimburse Wiers IT. This reimbursement procedure was followed with respect to services rendered by Hettich, as well as to services rendered by the payroll clerk and the sales processing clerk discussed above. When T. Wiers made a bulk purchase of new computers to be used at both the Wiers IT facilities and the Great Lakes facilities, Respondent Great Lakes paid Wiers IT for the computers that were placed at the Great Lakes facilities. The W-2 forms provided to individuals employed at the four Great Lakes facilities identified the employer as Great Lakes International Trucks even after T. Wiers began using the Wiers IT name at those facilities. The W-2 forms issued to employees at the Wiers IT facilities, on the other hand, listed the employer as Wiers International Trucks. After Timothy Burelison was moved from a Great Lakes facility to a Wiers IT facility in May 2007 he received a Great Lakes W-2 form for the pretransfer period and a Wiers IT W-2 form for the posttransfer period. T. Wiers ran a number of marketing advertisements in the name of Respondent Great Lakes, without any mention of Wiers IT.

When T. Wiers became president of Respondent Great Lakes he did not replace the employees with Wiers IT staff, but rather retained the Great Lakes employees and continued to pay them at Great Lakes' established wage rates. He made annual recommendations for merit wage increases at the Great Lakes facilities, but had to obtain approval from the Great Lakes board before implementing those increases. Employees who worked at the Great Lakes facilities remained in Respondent Great Lakes' health plan, while employees at the Wiers IT facilities were covered by a separate Wiers IT health plan. Respondent Great Lakes and Wiers IT maintained separate workers' compensation insurance, and separate business numbers. The record also showed that after Respondent Great Lakes began using the Wiers name for much of its operation, it continued using the Great Lakes name for commercial truck leasing.

T. Wiers' tenure as president of the Great Lakes facilities was terminated on July 13, 2007. All of the unfair labor practices described in the complaint are alleged to have occurred during the period when T. Wiers was president of Respondent Great Lakes. After July 13, T. Wiers continued to be owner, president, and chief executive officer of Wiers IT, as he had been for many years prior to his involvement with Respondent Great Lakes. Similarly, Hettich continued in his position with Wiers IT, but no longer had any role at the Great Lakes facilities. After T. Wiers' tenure as president of Respondent Great Lakes ended, Respondent Great Lakes continued to employ a majority of the employees who were already working at the Great Lakes facilities.

⁷ In its answer, Respondent Great Lakes denied that Hettich was its supervisor and agent during the relevant time period, but that contention is wholly without merit. Given Hettich's authority at the Great Lakes facilities as summarized above, he was, without doubt, Respondent Great Lakes' supervisor with the meaning of Sec. 2(11) and its agent within the meaning of Sec. 2(13) during the period when he allegedly took actions that violated the Act. Moreover, an individual who engages in interrogations, promises of benefit, or other coercive activity is an agent of the employer if the individual was placed by management in a strategic position where employees could reasonably believe he spoke on its behalf. *CDR Mfg.*, 324 NLRB 786 (1997); *Roskin Bros., Inc.*, 274 NLRB 413, 421 (1985); *Elias Mallouk Realty Corp.*, 265 NLRB 1225, 1234-1235 (1982); *B-P Custom Building Products*, 251 NLRB 1337, 1338 (1980). Respondent Great Lakes placed Hettich in such a position.

III. UNION CAMPAIGN

A. Representation Petition

In early 2007, Robert Mohny and William Allison—mechanics at the Great Lakes facility in Elkhart—contacted a business agent of the Union about meeting with employees. Mohny and Allison subsequently informed other employees that the Union was interested in representing mechanics at the Elkhart facility. During the relevant time period, the Elkhart facility employed between five and nine such mechanics—referred to there as “service technicians.” A number of the service technicians who Mohny and Allison talked to about representation signed union authorization cards. The service technicians also held group union meetings, talked informally about the Union, and displayed various types of pronoun paraphernalia.

The record shows that the three alleged discriminatees—Timothy Burelison, John Bussey, and Eric Reamer—participated in the Union activities. All three signed union authorization cards and attended group union meetings. Burelison attended five or six of the union meetings, Bussey attended multiple such meetings, and Reamer attended nearly all of the meetings. The three alleged discriminatees also talked to other employees about their support for the Union. Bussey and Reamer both placed pronoun stickers on the toolboxes that they kept in the facility’s shop—a location where the stickers could be seen by employees, supervisors, and managers.⁸ In addition, Reamer placed a pronoun bumper sticker on the vehicle that he drove to work and parked in the facility’s parking lot. He also wore a keychain bearing a union insignia in such a way that it could be seen by others. Hettich did not deny that he observed the public displays of union support by the three alleged discriminatees, nor did he deny that he was aware that those employees supported the Union. T. Wiers denied that he saw any antiunion paraphernalia at the Elkhart facility, but did not deny that he was aware that the three alleged discriminatees were among the service technicians who supported the Union.

On April 6, 2007, the Union filed a petition to be certified as the collective-bargaining representative of a unit comprised of “All full-time and regular part-time mechanics” at the Elkhart facility.⁹ Respondent Great Lakes actively opposed the unit description in the petition, contending it should be broadened beyond the group of eight service technicians who the Union was seeking to represent, so as to include two service advisors/writers (who distribute work assignments to the technicians) and four parts department employees. A hearing was held regarding these contentions on April 20, 2007. At the hearing, the Union called two of the alleged discriminatees—

⁸ Burelison also displayed pronoun paraphernalia, but only after he was informed that he was being transferred.

⁹ In its brief, Respondent Great Lakes concedes that it was the employer of all employees at the Elkhart facility from February 24, 2006, to July 13, 2007. The Union’s representation petition named “Wiers International Trucks” as the employer, but T. Wiers testified that while the Elkhart facility was doing business under the Wiers IT name, the actual owner-employer was always Respondent Great Lakes. I find that Respondent Great Lakes has been the owner-employer at the Elkhart facility during the time period relevant to this litigation.

Timothy Burelison and John Bussey—as witnesses. Hettich was present when Burelison and Bussey testified. Shortly thereafter, Hettich approached Burelison at work and said that he was “surprised” to see him at the hearing. In a decision issued on May 21, 2007, the Regional Director determined that the unit description that the Union set forth in its petition—which was limited to service technicians—was appropriate.

B. Employer’s Opposition to the Union

1. Antiunion campaign

T. Wiers testified that he opposes unionization. The Wiers IT employee handbook has a section entitled “management philosophy” that is concerned almost exclusively with opposition to unionization. That handbook states that “Wiers is a non-union company,” and that the company “inten[ds] to oppose unionization by every proper means.” Respondent Great Lakes began to distribute this handbook at the Elkhart facility shortly after the Union filed the representation petition.

When he received the representation petition, T. Wiers retained an attorney to help him “fight” the Union, campaign for a “no” vote, and identify legal “do’s and don’ts.” T. Wiers notified the Great Lakes board of managers of his intention to oppose the union campaign and obtained its approval for his choice of an attorney to help in the effort. After being retained, the attorney assisted Respondent Great Lakes in developing the antiunion campaign and reviewed materials that the Respondent disseminated to employees. T. Wiers also obtained the assistance of a consultant who had been involved with a successful antiunion campaign at another company. That consultant, Gary Mullennix, individually interviewed each person working at the Elkhart facility in order to identify the employees’ sources of discontent.¹⁰ T. Wiers stated that the proper analogy for Great Lakes’ antiunion campaign at the Elkhart facility is the legal defense mounted by a person wrongly accused of committing a crime.

2. T. Wiers conducts mandatory group meetings

T. Wiers conducted three group meetings with Elkhart employees regarding the Union. He required the service technicians to attend each of these meetings. Hettich and the Elkhart service manager, Jon Breitenbucher, were also present. The first meeting was held on about April 25 or 26, the second on about May 2, and the third in early or mid-May. According to T. Wiers, the purpose of these meetings was to “educate,” employees about unions, not to “sway” them to vote one way or the other. (Tr. 126.) That characterization, however, is not credible given the record evidence about his presentations.¹¹

¹⁰ Mullennix was soliciting grievances on behalf of Respondent Great Lakes and I find that he was its agent for purposes of that activity. The Respondent placed Mullennix in a strategic position where employees would reasonably believe he was soliciting grievances on its behalf. See *CDR Mfg.*, supra; *Roskin Bros., Inc.*, supra; *Elias Mallouk Realty Corp.*, supra; *B-P Custom Building Products*, supra.

¹¹ Based on his demeanor and testimony, I found T. Wiers a less than fully credible witness. On several occasions while testifying he became visibly amused, giving the impression that he did not believe the proceedings were to be taken seriously. In addition, he showed a willingness to provide testimony that he certainly knew was false, such as the

The written documents that T. Wiers used at the meetings, and the testimonies of attendees and T. Wiers himself, show that T. Wiers' purpose was precisely to sway employees to vote against the Union. Although he briefly discussed the mechanics of the upcoming representation election, he limited his discussion primarily to impugning the motives of union officials and highlighting negative aspects and possible adverse consequences of unionization. The written outline that T. Wiers prepared of his remarks at the April meeting states: "Wiers does not want a union. Any union is a thorn. It is a thorn in your side and it is a thorn in our side." Regarding the Union's motivation at the Elkhart facility, T. Wiers stated: "Why are they here? Money! The Operating Engineers want your money . . . to support their expensive habits." He stated, further, that the Union's "sole purpose is to serve the Union's interests and not yours."

A slide that T. Wiers presented to employees at the second of the mandatory meetings was titled "Union Facts" and stated that if employees elected to be represented by the Union the employees "will work for the union—not for Wiers." The same slide went on to state that if employees elected the Union they could "Expect" "No increased health care benefit," "No wage benefit," and "No pension benefit." T. Wiers stated that wages would not change and that he did not have to sign a contract, only negotiate in good faith. Another slide in the presentation stated that unionization caused "top performers [to] leave." The written remarks that T. Wiers prepared for one of the meetings state that "no one would support a union if you did not believe the union was going to get you something," and that "supporting the union is like buying a raffle ticket, the chances of winning are minimal." Generally, the only employee who asked questions during these presentations was alleged discriminatee Burelison, and T. Wiers appeared disturbed by those questions.

Reamer testified that T. Wiers' general subject at the meetings was that selecting the Union "would only increase the hardships [employees] would have to go through." T. Wiers showed employees a video presentation which stated that "the union is only looking out for their best interests and not your best interests" and did not discuss potential advantages of unionization. Burelison remembered that T. Wiers was "open and

above-mentioned statement that it was not his purpose during the mandatory group meetings to "sway" employees to vote one way or the other regarding union representation. That statement is wholly incredible based not only on the content of the presentations, but also on T. Wiers' testimony that the meetings were part of a campaign against the Union. In other instances he responded to questions in an evasive manner. For example, during questioning by counsel for the General Counsel, he first denied that Elkhart employees were not receiving reimbursement for training/certifications, but when pressed he conceded that the Elkhart employees did not even know that such a benefit existed and were not being reimbursed. In reaching my conclusion that T. Wiers was not a particularly credible witness I considered the fact that he was no longer associated with Respondent Great Lakes and that the company he continued to be associated with, Wiers IT, had already settled with the Board. However, based on his demeanor and testimony I was left with the impression that T. Wiers remained inclined to slant his account in order to cast his actions as president of Respondent Great Lakes in the most favorable light.

adamant that he was campaigning against the Union and that he wanted the shop to stay union-free." According to Bussey's testimony, T. Wiers held up the Union's financial statement at the meeting and stated that the Union was "just out to collect the dues" and "weren't going to give . . . any representation."

The evidence shows that at one of the Respondent's mandatory group meetings, Burelison complained that employees were not being reimbursed for training and certifications. Employees also raised this concern to Mullenix during their one-on-one interviews, and Mullenix communicated this to Hetlich. At the second mandatory meeting, T. Wiers presented a slide stating that, with the Company, employees were reimbursed for training and for the costs associated with obtaining commercial drivers licenses. T. Wiers also apparently outlined the mechanics of how employees could go about obtaining such reimbursement.

The alleged discriminatees testified that T. Wiers made a number of statements about closing the Elkhart facility. Burelison testified that at one of the meetings, T. Wiers "said he would have to close the facility because with the Union in there, there's no way that it would be profitable." Bussey testified that at the first of the mandatory meetings, T. Wiers "basically told us," that if the Union won the election "he was going to have to close the shop." Elsewhere in his testimony, Bussey recounted T. Wiers stating, "[T]hat if this keeps up, if the union gets elected, that they're basically going to close the doors." Bussey testified that T. Wiers also touched on this subject during the second mandatory meeting, stating that "if it kept going on that he was going to close the doors to Elkhart." According to Bussey, at the third meeting, T. Wiers referenced the money he had spent on attorneys fees to fight the union, and stated that he was going to have to close the doors at the Elkhart facility if he had to keep paying such "exorbitant" attorneys fees. Reamer testified that, during a one-on-one conversation, T. Wiers told him, "I don't know if I can keep the doors open with all these attorney fees and fighting the union."

When asked whether he stated that he would close the facility, T. Wiers responded:

If there was any discussion through the course of this campaign, the discussion would have been that Elkhart was not a profitable location. I believe I stated that the Union would not make Elkhart a profitable location and that it was up to us, being collectively management and employees, to make the Elkhart profitable and that no business or no location over the long term that wasn't profitable would remain in business.

(Tr. 331.) T. Wiers also testified that he told employees having a union would increase the legal expenses and the administrative expenses for the Company. One of the slides he presented to employees at the group meetings warns that the cost associated with the Union "further reduces profitability and viability of Elkhart location." T. Wiers told employees that the Company had the "right to determine viability of the Elkhart location." The same slide states that the Company had spent \$20,000 to defend against the Union at Elkhart and that if employees voted for union representation there would be further costs associated with negotiating. T. Wiers also presented a

slide indicating that employees' "future" would be uncertain if they elected the Union.¹²

I find that the record does not establish that T. Wiers explicitly stated that he would close the Elkhart facility rather than operate it with a union in place or during an ongoing union campaign. T. Wiers essentially denied making such statements and although I found him a less than candid witness, see *supra* footnote 11, his denial was consistent with the documentary evidence and was otherwise plausible. To the extent that the testimonies of Burelison, Bussey, and Reamer indicate that T. Wiers said that he would close the facility because of unionization or the union drive per se—as opposed to unprofitability that T. Wiers predicted would be exacerbated by unionization—I find that such testimony does not outweigh the contrary evidence. The accounts of T. Wiers' exact wording that were given by Burelison, Bussey, and Reamer were not consistent. Indeed, Reamer did not recount T. Wiers making any statements regarding plant closure during the mandatory group meetings, but only during an individual meeting between T. Wiers and himself. Moreover, Bussey qualified his testimony by stating that T. Wiers "basically" made certain statements regarding plant closure, not that he made exactly those statements. Burelison testified about statements made by T. Wiers regarding closure of the facility, but was unable to remember when precisely T. Wiers made those statements. For these reasons I find only that T. Wiers made those statements regarding plant closure that he testified to and/or that are memorialized in the documentary evidence from his presentations.¹³

3. Agents of Employer meet individually with employees

T. Wiers and Hettich also discussed the Union during unscheduled one-on-one meetings with most of the employees at the Elkhart facility. These individual meetings generally occurred immediately after the mandatory group meetings during

which T. Wiers had campaigned against the Union. During the individual meetings, T. Wiers and Hettich would typically ask employees what they thought the Union could do for them. Hettich would also discuss problems that employees were having with payroll, health insurance, job transfers, and the union campaign—the idea being that Hettich would try to help employees with those problems.

Burelison described the individual meetings that T. Wiers and Hettich each conducted with him. T. Wiers conducted his meeting with Burelison in the employee breakroom, while Hettich approached Burelison near his toolbox, which Burelison described as a "more isolated" location. Both T. Wiers and Hettich asked Burelison why employees would want to have a union. Burelison told them that it was because of issues relating to insurance, pension, and "quality of work life." During these meetings, both officials asked Burelison what he thought the results of the election would be.¹⁴ In addition, Hettich asked Burelison, "[W]ho he thought was in favor and who wasn't."¹⁵ During a one-on-one meeting, T. Wiers asked Bussey how he thought the Union would benefit him. Bussey answered that the Union provided better benefits—an answer to which T. Wiers reacted by "kind of frowning." The exchange made Bussey uncomfortable and he ended the conversation at the first opportunity.

Hettich conducted a one-on-one meeting with Reamer in the Elkhart facility's parking lot. Hettich told Reamer: "I understand the union people are hitting you guys kind of hard. I just want you to know that we are the good guys in this." Then Hettich asked Reamer whether he was attending the union meetings. Reamer answered that he had, but probably would not attend future meetings. Hettich asked Reamer whether he knew anyone else who was going to the union meetings. Reamer responded either "no" or "I can't tell you." During a subsequent conversation—this one a few days before Reamer was transferred—Hettich told Reamer that he had "heard a vicious rumor." When Reamer asked what the rumor was, Hettich responded, "I heard you were for the Union." Then Hettich asked, "Are you for the Union or for the company?" Reamer answered, "I'm for the Union at this time." Hettich then warned: "[O]nly . . . three things can happen with the Union coming in here. One it can get better; two it can stay the same; or three, it can get worse. It's not going to get better and it's not going to stay the same. It can only get worse."

After receiving the union petition, Respondent Great Lakes arranged to have a consultant, Gary Mullennix, assist in the antiunion campaign. Mullennix conducted individual interviews of approximately 30 minutes in length with every em-

¹² This slide is titled "What do you have with Union?" and then lists, *inter alia*, "Future?"

¹³ That being said, it is not surprising to me that Burelison, Bussey, and Reamer would understand T. Wiers to be saying that they would lose their jobs at the Elkhart facility if employees elected to be represented by the Union or continued the union campaign. The evidence suggests that T. Wiers, who reviewed the information he disseminated with legal counsel, chose his words carefully to leave employees with the impression that unionization would result in the closure of the Elkhart facility, without actually stating that it was unionization or union activity, as opposed to the unprofitability that he predicted unionization would exacerbate, which would lead to closure. As the Supreme Court has noted, when reviewing such comments one "must take into account the economic dependence of the employees on their employer, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969); see also *American Pine Lodge Nursing*, 325 NLRB 98 fn. 1 (1997), *enf. granted in part, denied in part* 164 F.3d 867 (4th Cir. 1999) ("A trier of fact is not required to accept the entirety of a witness' testimony, but may believe some and not all of what a witness says."); *Excel Containers, Inc.*, 325 NLRB 17 fn. 1 (1997) (nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness' testimony).

¹⁴ Burelison credibly testified that both officials asked him what he thought the result of the election would be. Hettich confirmed that he had posed this question and T. Wiers stated that he did not recall asking the question, but did not specifically deny that he had done so.

¹⁵ I base the conclusion that Hettich asked Burelison to reveal who he thought was in favor of the Union on Burelison's account. Tr. 239. Hettich stated that "to the best of [his] knowledge" he did not "specifically" ask employees about their own positions regarding the Union. Tr. 210. Not only is that denial somewhat half-hearted sounding, but even if credited it would not rebut Burelison's testimony that Hettich asked him to reveal *other* employees' union views.

ployee at the Elkhart facility. Hettich, who scheduled the interviews, testified that this activity was motivated by the Union's petition and that the purpose was to find out what the employees' issues and concerns were so that the employer would be able to correct them. After Mullennix had finished interviewing employees, he met with Hettich to discuss the issues raised by employees. Hettich then talked to employees on the shop floor or in break areas to follow up on the issues and concerns that had been brought to his attention. T. Wiers, in an April 20 report to the Great Lakes board of managers, stated that he was working with Mullennix and a labor law attorney to "resolve the issues."

IV. REIMBURSEMENT FOR OBTAINING CERTIFICATIONS AND COMMERCIAL DRIVERS LICENSES

When Burelison and Bussey were hired at the Elkhart facility in December 2006, they understood that the employer would reimburse them for obtaining Automotive Service Excellence (ASE) certifications and a Commercial Drivers License (CDL). According to Burelison, it was "pretty expensive" to obtain the ASE certifications and a CDL, and the employer's promise of reimbursement was one of the reasons he had accepted the position at the Elkhart facility. Shortly thereafter, Kevin Fields—who at the time was the service manager at the Elkhart facility—announced to Bussey and other employees that the Company could no longer afford to reimburse them and was discontinuing the benefit. In February 2007, Burelison asked Fields about the training/certification benefit, and Fields told him that "we're not going to follow through with it at this time."¹⁶

At one of the mandatory antiunion meetings, as well as during interviews with Mullennix, employees at the Elkhart facility complained that they were not being reimbursed for obtaining ASE certifications and CDLs. At the second group meeting, T. Wiers presented a slide which stated that the employer was providing employees with "Paid ASE," and "Paid CDL." T. Wiers discussed how reimbursements worked under that program. He also responded to employee questions regarding the program by distributing copies of the Wiers IT handbook. He testified that the handbook, which employees at the Elkhart facility had not received until then, explained the benefit.¹⁷ Up until that time, Respondent Great Lakes had not provided Burelison with any training materials, but about 1 week after the second meeting, Hettich gave Burelison guides and training videos that were part of the ASE/CDL reimbursement program.

T. Wiers denied that the ASE/CDL reimbursement benefit was new. However, he made no effort to explain the unrebutted testimony that, shortly before the start of the union campaign, the Elkhart service manager told multiple employees that the benefit would not be provided to them. Moreover, T. Wiers' claim that employees had the benefit before the union

campaign is undercut by his statement that the benefit was set forth in the Wiers IT handbook, since by his own account employees at the Elkhart facility did not receive that handbook until after they raised the ASE/CDL reimbursement issue during the union campaign. Indeed, T. Wiers and Hettich admitted that it became clear during the union campaign that employees at the Elkhart facility had no knowledge that reimbursement for ASE certification or CDLs was available to them and were not, in fact, obtaining reimbursement.

V. TRANSFERS AND TERMINATION

In May 2007, T. Wiers made four personnel transfer decisions that involved the Elkhart facility. The first was in early May when he transferred a service technician named Gary Morton to the Elkhart facility from the Wiers IT facility in Plymouth.¹⁸ In his May report to the Great Lakes board of managers, T. Wiers commented: "[Morton's] been with me since 1994. Good person and he will help train the current staff. Important move. Union vote is scheduled for end of May/beginning June. I am cautiously optimistic about the outcome."

Subsequently, at least two things happened that could be expected to dampen T. Wiers' optimism that the Union would be defeated in the upcoming election. First, on May 21, 2007, the Regional Director issued a decision rejecting the Employer's contention that the unit definition should be altered to include service writers and employees of the parts department. Second, Reamer, under questioning by Hettich, announced that he was "for the Union."

On May 25, a few days after the board's May 21 decision and Reamer's declaration, T. Wiers had Hettich inform Burelison, Bussey and Reamer that they were all being transferred from the Elkhart facility. All three of these service technicians had been included on the list of eligible voters that Respondent Great Lakes submitted for the payroll period ending on May 13, 2007. T. Wiers admitted that he transferred these employees out of the bargaining unit against the advice of the labor attorney who he had specifically retained to advise the Company on "do's and don'ts" during the organizing campaign. (Tr. 120, 131–132.) T. Wiers transferred Burelison to the Plymouth facility—the same location *from* which he had just recently transferred Morton *to* Elkhart. Thus, T. Wiers effectively traded Burelison—a known union supporter—for Morton—an individual who T. Wiers had employed since 1994. Morton was closely enough associated with T. Wiers that when Respondent Great Lakes ended T. Wiers' tenure as its president, Morton, unlike other employees, left with T. Wiers and returned to the Plymouth facility. T. Wiers transferred Bussey to the Great Lakes facility in Kalamazoo, and Reamer to the Great Lakes facility in South Bend. Burelison and Reamer were re-

¹⁶ Fields did not testify. There was no evidence contradicting Bussey's and Burelison's testimonies that Fields announced discontinuation of the benefits relating to ASE certification and CDLs.

¹⁷ In the past, a Great Lakes handbook had been distributed at the Elkhart facility. The Great Lakes handbook was not introduced as an exhibit and there was no evidence that it discussed the ASE/CDL reimbursement benefit.

¹⁸ By using the term "transfer" to refer to the removal of Morton from the Plymouth facility and his placement at the Elkhart facility, I do not mean to suggest that those two facilities were part of a single-integrated business enterprise/single employer or a joint employer. As discussed below, Plymouth and the other Wiers IT facilities were not part of such a relationship with the Great Lakes facilities such as the Elkhart location. However, the fact that T. Wiers was the president of both Respondent Great Lakes and Wiers IT enabled him to carry out "transfers" between the two separate companies.

quired to report to their new duty stations on May 30, and Bussey on May 31.

T. Wiers testified that he made the decision to transfer three of the eight service technicians eligible to vote in the upcoming election at the Elkhart facility because there was not enough work for the service technicians assigned to that location. He stated that the reason he chose Burelison, Bussey, and Reamer as the three service technicians transferred was that they had previously asked Hettich for transfers and were the three least senior service technicians.¹⁹ When pressed, however, T. Wiers stated that only Bussey and Reamer had “definitely” requested transfers. (Tr. 99–100.) After carefully considering the record, I find that the evidence does not show that any of the alleged discriminatees requested transfers. In Burelison’s case, even Hettich, to whom T. Wiers claims the transfer requests were made, said that Burelison was not among the employees who had made such a request. Burelison and Bussey both clearly and confidently testified that they had never requested transfers (Tr. 266–267, 315), and based on their demeanor and testimony, and the record as a whole, I credit that testimony.²⁰ In the case of Reamer, while the record shows that months earlier he had broached the subject of working at the South Bend location, it supports his testimony that he never asked to transfer. (Tr. 288.) More specifically, the record shows that about 3 weeks after starting work at the Elkhart facility in January or February 2007, Reamer asked Hettich, “[W]hat the possibility would be,” of working at the South Bend facility. Hettich responded that it would probably not be possible for Reamer to work at the South Bend facility because Reamer’s father was a service advisor/writer at that location. Therefore, if Reamer worked at the South Bend location his own father would be assigning work to him. Hettich told Reamer that it was “against company policy to have family members working in the same department in the same facility.”²¹ Reamer credi-

bly testified that during the approximately 3 months between the time of this discussion and the time he was forced to transfer from the Elkhart facility to the South Bend facility, he never again raised the subject with the Respondent. Reamer testified, further, that he wanted to stay at the Elkhart facility, but that Hettich told him his only choices were to transfer to the South Bend facility, or be laid off.

To support the claim that Bussey and Reamer requested transfers, Respondent Great Lakes relies primarily on the testimony of Hettich. Hettich testified that Bussey, Reamer, and a third Elkhart service technician named Anthony Hood asked him if they could transfer after the Union filed its petition to represent employees. According to Hettich, all three stated that they wanted to transfer in order to avoid involvement with the Union. I find Hettich’s testimony on this score less credible than the denials of Bussey and Reamer. First, it is facially implausible that Bussey and Reamer, both of whom publicly supported bringing the Union to the Elkhart facility, would seek to abandon that facility in order to avoid involvement with the Union. Moreover, Hettich’s testimony on the subject vacillated. At first he testified that Bussey requested a transfer to Kalamazoo, but then he qualified his testimony to state that all Bussey “actually” did was “mention[] that there was an opportunity for him to go to work” for a manufacturing company “that was located in Kalamazoo.” Similarly, after first stating that Reamer was seeking a transfer to South Bend to avoid involvement with the Union, Hettich later gave other reasons—for example, that Reamer wanted to work with his father or felt he could be mentored more professionally in South Bend.

While T. Wiers repeatedly claimed that he was merely “honoring” the transfer requests purportedly made by the alleged discriminatees (Tr. 99–101), that characterization is hard to square with the record evidence. First, as discussed above, the credible evidence did not show that any of the three alleged discriminatees asked to transfer. Second, the three individuals who supposedly requested transfers were Bussey, Reamer, and Hood—not Burelison. If T. Wiers’ motivation was to satisfy employees’ transfer requests then I would expect him to consider Hood before choosing to impose a transfer on Burelison—a union supporter who wanted to remain at the Elkhart facility. Third, T. Wiers’ claim that the Company was merely honoring the requests of employees is undercut by the manner in which the transfers were presented to the employees involved. On May 25, Hettich did not *offer* the alleged discriminatees the *opportunity* to transfer, but *told* them they *had* to transfer if they wished to continue working. Hettich told Reamer, “You’re going to South Bend or you can choose to be laid off.” Hettich told Burelison that he had “no choice but to be transferred to Plymouth.” (Tr. 267.) Burelison expressed displeasure, pointed out that Morton had just been transferred from Plymouth to Elkhart, and said that if he had to leave the Elkhart facility he would prefer to go to the Kalamazoo facility. The Respondent did not allow Burelison to remain at the Elkhart facility or move to the Kalamazoo location, but rather “hon-

¹⁹ Respondent Great Lakes does not claim that employee performance had anything to do with the decisions to transfer the alleged discriminatees, but T. Wiers implied that Burelison’s skills were somehow lacking. Tr. 99. The Respondent’s own records for April 2007—the last full month before the transfer decisions were made—report that Burelison was the third most productive of the eight service technicians at the Elkhart facility. GC Exh. 15. Burelison testified that his efficiency rating placed him the top three of the eight service technicians at the Elkhart facility. Burelison had been working as a service technician continuously since 1979 and was actively recruited to work at the Elkhart facility. During Burelison’s relatively brief period of employment at the Elkhart facility, Respondent Great Lakes granted him a wage increase.

²⁰ In addition, I note that Bussey was still working for Respondent Great Lakes at the time he testified. While my credibility determination regarding Bussey is made independently of that fact, I nevertheless note that crediting him is consistent with the Board’s view that the testimony of a current employee that is adverse to his employer is “given at considerable risk of economic reprisal, including loss of employment . . . and for this reason not likely to be false.” *Shop-Rite Supermarket*, 231 NLRB 500, 505 fn. 22 (1977); see also *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069 fn. 2 (2004), *enfd.* 174 Fed. Appx. 631 (2d Cir. 2006); and *Flexsteel Industries*, 316 NLRB 745 (1995), *enfd. mem.* 83 F.3d 419 (5th Cir. 1996).

²¹ The Wiers IT handbook, which was distributed to some Elkhart employees shortly before the transfers, includes a policy that disfavors

permitting relatives to work in proximity to each other and that permits “an employee [to] be directly or indirectly supervised by a relative” “[o]nly in extraordinary circumstances, with management approval.”

ored” his nonexistent transfer request by sending him to the Plymouth facility.

Regarding seniority—the record shows that Morton was the Elkhart service technician who had the least seniority with Respondent Great Lakes and at the Elkhart facility. The Plymouth location from which Morton had been moved earlier in May was not a Great Lakes facility, but a Wiers IT facility, and according to the Respondent’s own arguments—which, as discussed below, I accept—the Respondent was not involved with the Plymouth facility. Thus, there is no reason to assume that Morton’s seniority at the Wiers IT facility in Plymouth would be applicable at the Great Lakes facility in Elkhart and Respondent Great Lakes has not shown that it was applicable there. Moreover, the transfer policy in the Wiers IT employee handbook, which Respondent Great Lakes distributed to Elkhart employees prior to the transfers, does not include seniority as one of the factors identified as influencing transfer decisions.²²

Even assuming that the evidence had shown that Burelison, Bussey, and Reamer would be legitimate transferees in the event that there was not enough work for service technicians at the Elkhart facility, I find that Respondent Great Lakes has failed to show that such a work shortage existed. T. Wiers testified that there had not been enough work for the service technicians at the Elkhart facility since at least March 2007. However, Burelison and Reamer were both busy at the Elkhart facility prior to being transferred. The Respondent’s own records show that Burelison usually worked over 200 hours per month there, including during the final month before his transfer. The Respondent’s records also show that the monthly “sales dollars” from the work of service technicians at the Elkhart facility had been trending upward. Sales dollars increased substantially during every month from November 2006 (\$44,743.12) to February 2007 (\$64,348.60), dropped in March 2007 (\$36,333.54), but then rebounded in April 2007 to its second highest level during that period (\$57,487.00).²³ The

total number of hours worked by Elkhart service technicians also showed a general upward trend from 756.28 hours in November 2006 to a high of 1481.00 hours in March 2007, and reached its second highest level, 1298.20 hours, in April 2007. Perhaps more tellingly, the evidence showed that T. Wiers transferred Morton—a service technician trusted by him—to the Elkhart facility in early May 2007. Respondent Great Lakes provides no explanation why, if there really was a shortage of work for service technicians at the Elkhart facility, it transferred a service technician to that facility shortly before transferring the three alleged discriminatees away. It is true that the Company’s productivity figures for service technicians showed a downward trend—from 89 percent in November 2006 to 76 percent in April 2007. Nevertheless, the preponderance of record evidence clearly fails to support Respondent Great Lakes’ contention that a work shortage had created an urgent need to transfer service technicians from the Elkhart facility during the runup to the scheduled representation election.

VI. BURELISON AT PLYMOUTH

Burelison began working at the Plymouth facility on May 30, 2007, having been moved there from the Elkhart facility. The Plymouth location was the headquarters of Wiers IT and the service manager there was Matthew Cripe. Shortly after Burelison was transferred, Cripe overheard Burelison and another employee discussing the Union during a break. When Burelison returned to his workstation, Cripe followed him and stated, “We won’t be having any of the union conversations here.” On June 12—only 2 weeks after Burelison was transferred to the Plymouth facility—Cripe terminated Burelison’s employment. Cripe completed paperwork regarding Burelison’s termination in which he stated that the reason for the action was unacceptable performance.

At trial, Cripe explained his decision to terminate Burelison as follows: “He had some workmanship issues from when I was not at work. . . . And there were some issues when I was there after he had left for the day. . . . So basically what we had was we had a nondocumented verbal warning, and then we had a couple of documented written warnings all at once.” Cripes states that the first incident took place on June 4 and the second on June 8, but he admits that he did not document either of those incidents until he terminated Burelison on June 12.

Burelison testified that he was not responsible for the workmanship problems cited by Cripe. He stated that all the tasks at issue had been performed by, or assigned to, another service technician. The record showed that prior to the day of his termination, Burelison had never been disciplined at either the Elkhart facility or the Plymouth facility. Cripe informed Burelison about all of the purported performance issues at essentially the same time on June 12, and prepared the disciplinary paperwork all at once, but completed that paperwork so as to give the impression that Burelison had been given a chance to improve. The writeup for the first incident states, “Should Tim [Burelison] continue to have poor performance we will have no choice but to terminate him,” and the next writeup, prepared and issued at the same time, states that Burelison was being terminated.

²² The Wiers IT employee handbook, which was distributed to employees at the Elkhart facility starting in April 2007, includes a transfer policy. That transfer policy states in its entirety:

At the time of hire, every effort is made to place the employee in a job where his/her abilities are best utilized. The following reasons, however, are considered for transferring regular employees between jobs or departments:

- To provide the employee with a better opportunity to utilize present skills, ability and experience.
- To provide an opportunity for training so the employee may gain new skills and experience.
- To enable the employee to continue his/her employment when there are changes or reductions in department work schedules.
- To provide employment when physical limitations prevent the employee from continuing in the same job.

Transfer of employees from one department to another or from one location to another for the Company’s convenience may be made to meet Wiers requirements. A request for transfer should be made in writing and submitted to the Human Resources Department. A transfer may be made if management determines it is in the best interest of the Company and/or associate.

²³ April 2007 was the last month for which T. Wiers had figures when he decided to transfer the alleged discriminatees.

Analysis and Discussion

I. SINGLE-EMPLOYER AND JOINT EMPLOYER STATUS

The complaint alleges that, during the relevant time period, Respondent Great Lakes and Respondent Wiers IT were a single-employer/single-integrated business enterprise, Complaint paragraph 3(b), and also joint employers, *Id.* Paragraph 3(f), and that these related Respondents were responsible for various unfair labor practices. However, as mentioned above, at the start of the hearing, counsel for the General Counsel announced that Respondent Wiers IT had settled with Region 25 and that the General Counsel “was only proceeding against Great Lakes and whatever entity that constituted at the time in terms of the Elkhart facility.” See *supra*, footnote 1. At the hearing, Wiers IT did not enter an appearance through an attorney or other representative. Given that Wiers IT and the Board’s Regional Office had reached a settlement prior to the hearing, and that the General Counsel explicitly stated it was proceeding only against Respondent Great Lakes, it was appropriate for Wiers IT to understand that it was not involved in the hearing, and I believe it could run afoul of due process concerns for me to make any finding that imposes liability on Wiers IT for the unfair labor practices alleged in the complaint. For this reason, I do not reach the question of whether Wiers IT was involved individually, or as part of a single-employer/single-integrated business enterprise or a joint employer, in any of the unfair labor practices alleged in the complaint.

Moreover, it is not necessary for me to reach the question of whether the Elkhart facility was being operated under a single-employer or joint employer relationship in order to decide whether the one remaining Respondent—Great Lakes—is liable for violations committed at the Elkhart facility. Respondent Great Lakes concedes that it was the employer of the employees working at the Elkhart facility during the relevant time period. (R. Br. at 10.) The unlawful behavior that the complaint alleges took place at the Elkhart facility was that of T. Wiers and Hettich—persons who were acting as agents and supervisors of Respondent Great Lakes. Therefore, a full remedy may be ordered against Respondent Great Lakes for any of the alleged violations that occurred at the Elkhart location.

Respondent Great Lakes argues that it should not be held responsible for unfair labor practices at the Elkhart facility because the alleged actions were taken by T. Wiers without the actual knowledge of Respondent Great Lakes or the Great Lakes board of managers. About the most I can say for this argument is that I am rather amazed by counsel’s ability to make it with a straight face. Respondent Great Lakes had knowledge of the actions taken by T. Wiers at the Great Lakes facilities (including the Elkhart location) because T. Wiers was the president of Respondent Great Lakes, and its agent. See *supra*, footnote 5. In his capacity as president of Respondent Great Lakes, T. Wiers had the authority to, *inter alia*, hire, fire, and transfer employees at the Elkhart facility—including the alleged discriminatees. Respondent Great Lakes cites to no precedent under which a company can be held blameless for unfair labor practices committed by its own president while making employment decisions that are within the general scope of his or her authority. To the extent that it is necessary to de-

termine whether the Great Lakes board of managers had knowledge of T. Wiers’ actions, it is clear that at least part of that Board did since T. Wiers was a member of the Great Lakes board of managers. Moreover, T. Wiers made monthly reports to other members of the Great Lakes Board in which he advised them that he was waging an antiunion campaign and set forth some of his plans in that regard. The Great Lakes board of managers approved T. Wiers’ selection of a labor attorney to assist in resisting the Union.

Similarly, the record shows that Hettich, when he allegedly committed unfair labor practices at the Elkhart facility, was the district parts and service manager for Respondent Great Lakes and was acting as its agent and supervisor. Managers at the Great Lakes locations, including the Elkhart facility, all reported to Hettich, and Hettich had responsibility for the profitability of those locations. Mullennix, for his part, had been brought in by Respondent Great Lakes to work as an antiunion consultant and was attempting to identify the sources of employee discontent so that he could convey that information to Great Lakes officials and help them fight the Union. When Mullennix engaged in the allegedly unlawful conversations with Elkhart employees, he was acting as an agent of the Respondent. See *supra*, footnote 10.

A different situation is presented with respect to the unfair labor practices alleged to have taken place at the Plymouth facility.²⁴ That is one of the Wiers IT dealerships owned solely by its president and chief executive officer, T. Wiers. As discussed above, Respondent Great Lakes and its parent company had no ownership interest at all in the Wiers IT facilities. Since Wiers IT has settled with the Board’s Regional Office, the allegations involving the Plymouth facility are moot except to the extent that the remaining Respondent—Great Lakes—may be held liable for them. Such liability could be imposed in this case if Respondent Great Lakes and Wiers IT are either a single-employer/single-integrated business enterprise or joint employers at the Plymouth facility.²⁵ Contrary to the contention of the General Counsel, I conclude that it would not be appropriate to hold Respondent Great Lakes liable for violations at the Plymouth facility under either theory.

The analysis applicable to questions of “single-employer” status is described in *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982):

A “single employer” relationship exists where two nominally separate entities are actually part of a single integrated enterprise so that, for all purposes, there is in fact only a “single employer.” The question in the “single employer” situation, then, is whether the two nominally inde-

²⁴ Those allegations concern Cripe’s conduct at the Plymouth facility in prohibiting Burelison from discussing the Union while on break and in disciplining and terminating Burelison.

²⁵ Although the General Counsel also argues that Respondent Great Lakes is liable as a successor, that argument is confined to allegations regarding conduct at the Elkhart location, one of the Great Lakes facilities. The General Counsel does not argue that Respondent Great Lakes is a successor employer at Wiers IT facilities, such as the Plymouth location, which it neither owns nor operates.

pendent enterprises, in reality, constitute, only *one integrated enterprise*.

.....
In answering questions of this type, the Board considers the four factors approved by the *Radio Union* court. (380 U.S. at 256, 85 S.Ct. at 877): (1) functional integration of operations; (2) centralized control of labor relations; (3) common management; and (4) common ownership. Thus, the “single employer” standard is relevant to the determination that “separate corporations are not what they appear to be, that in truth they are but divisions or departments of a single enterprise.” *NLRB v. Deena Artware, Inc.*, 361 U.S. 398, 402, 80 S.Ct. 441, 443, 4 L.Ed.2d 400 (1960). “Single employer” status ultimately depends on all the circumstances of the case and is characterized as an absence of an “arm’s length relationship found among un-integrated companies.” [Citations Omitted.]

As the Board has noted, none of the four factors is controlling as single employer status ultimately depends on all the circumstances of the case. *Richmond Convalescent Hospital*, 313 NLRB 1247, 1249–1250 (1994). “However, the Board has determined that the first three factors are of particular importance, especially the centralized control of labor relations.” *Id.*

Considering the record through the prism of these factors, I conclude that the General Counsel has failed to show that Respondent Great Lakes and Wiers IT were so integrated as to have lost their discrete business identities and become a “single employer” at the Plymouth location.²⁶ Regarding the first factor—“functional integration of operations”—although T. Wiers was making moves towards what he called “commonality” in certain respects, the record shows that at the time in question a clear demarcation continued to exist between the operations as concerned the Plymouth location. Respondent Great Lakes and Wiers IT did not commingle money, personnel, or equipment at the Plymouth dealership to any significant extent. See *R. Sabee Co.*, 351 NLRB No. 100, slip op. at 1 fn. 5 (2007) (reversing finding of “single-employer” status where there was common ownership but evidence regarding commingling of assets was equivocal) and *Richmond Convalescent Hospital*, supra (no single-employer status where there was common management and ownership, but “no evidence of employee interchange, commingling of funds, centralized administration, transfers of equipment or any other financial integration”). Respondent Great Lakes and Wiers IT each had their own, separate, bank accounts, out of which they paid they own employees. Paychecks and W-2 forms issued to Burelison at the Plymouth facility listed Wiers IT as the employer, without any reference to Respondent Great Lakes. Although Great Lakes employees sometimes did work for the benefit of Wiers IT, employees were not freely or informally exchanged between the two entities. Rather, Wiers IT was billed, and re-

quired to reimburse Respondent Great Lakes, for the hours of work that Great Lakes employees did for Wiers IT. Similarly, if Wiers IT employees performed work for the benefit of Respondent Great Lakes, Great Lakes was required to reimburse Wiers IT for the hours of the Wiers IT employees. The record did not demonstrate significant transfers of equipment between the two entities. On one occasion, Wiers IT purchased computers in bulk and some of the computers were placed at Great Lakes facilities. However, that did not compromise the financial separation, or arms length relationship, between the entities because Respondent Great Lakes was billed by Wiers IT for the cost of the computers used at the Great Lakes facilities. I conclude that consideration of the first factor—functional integration of operations—does not support a finding that Wiers IT and Respondent Great Lakes were operating as a single employer at the Plymouth location.

Regarding the second and third factors—common management and centralized control of labor relations—the strongest evidence in favor of such integration is the service of T. Wiers, and his deputy, Hettich, as managers for both Respondent Great Lakes and Wiers IT. The record indicates that, in practice, this was not the equivalent of the integration of those functions. T. Wiers operated the Great Lakes facilities under the oversight of the Great Lakes board of managers and at its pleasure, whereas he operated the three Wiers IT facilities as his own enterprise without involvement by Respondent Great Lakes. Not only was T. Wiers contractually required to apply the Great Lakes’ “business management and other policies” at the Great Lakes facilities, but auditors from Respondent Great Lakes made visits to confirm that that T. Wiers was doing so. Under the purchase agreement and bonus contract, Respondent Great Lakes and/or International Dealcor retained the absolute right to remove T. Wiers from his position as president of Great Lakes. At the Wiers IT facilities, on the other hand, T. Wiers was the final authority on management policies and was under no obligation to follow Great Lakes policies. Respondent Great Lakes had no right to audit the Wiers IT facilities, or to remove T. Wiers from his positions with Wiers IT.

Similarly, in the operation of the Great Lakes facilities, T. Wiers was required to obtain approval from the Great Lakes board of managers for expenditures over \$10,000, to consult with the board of managers regarding other significant business decisions, and to discuss the finances of the Great Lakes facilities in monthly reports to Great Lakes and/or International Dealcor officials. This is in sharp contrast to the way the Wiers IT facilities, such as the Plymouth location, were operated. At those locations T. Wiers was free to make expenditures of any amount and even the most significant of business decisions without notifying, much less obtaining the approval of, the Great Lakes board of managers or International Dealcor.

The record provides numerous examples showing that labor policies at the Great Lakes facilities and the Wiers IT facilities were not handled in a unitary fashion. At the time he took over the Great Lakes facilities, T. Wiers did not conform the wages there to those in place at the Wiers IT locations, but rather continued to pay the employees of the Great Lakes facilities the wages established by Respondent Great Lakes. In addition, Employees at the Great Lakes facilities remained in the Great

²⁶ This should not be interpreted as a determination that no such relationship existed at the Great Lakes facilities—Elkhart, Jackson, Kalamazoo, and South Bend. Somewhat different facts exist at those facilities, and for the reasons discussed above, I reach no determination regarding whether those facilities were operated as part of a single employer or a joint employer relationship.

Lakes health plan and workers' compensation insurance, while employees at the Wiers IT facilities were covered by Wiers IT health insurance and workers' compensation insurance. At the time that T. Wiers became president of Respondent Great Lakes, the Great Lakes facilities continued to use Great Lakes' own employee handbook, and the Wiers IT facilities used a different, Wiers IT, handbook. It was not until over a year later, after the Union filed its representation petition, that T. Wiers first began to distribute the Wiers IT handbook to some employees at the Elkhart facility. T. Wiers' testimony suggested that this distribution was part of an effort to respond to employee complaints and questions regarding training/certification reimbursement benefits. The circulation of the Wiers IT handbook at the Elkhart facility did not mean that the Wiers IT policies all became applicable at the Elkhart location or any of the other Great Lakes facilities. Indeed, T. Wiers testified, without contradiction, that Wiers IT policies were not generally applied at the Great Lakes facilities, but rather were adopted there only "to some degree" with respect to what were identified as "best practices." The record does not show that employees at the Great Lakes facilities surrendered their Great Lakes handbooks or were told that the existing Great Lakes policies had been supplanted.

On balance, I conclude that the evidence concerning common management and centralized labor relations does not support finding that Respondent Great Lakes and Wiers IT were operating as a single employer at the Plymouth facility.

The fourth relevant factor is "common ownership." The record shows that the Wiers IT facilities, such as the Plymouth dealership, were owned solely by T. Wiers. Respondent Great Lakes and International Dealcor never had any ownership interest at all in those facilities. It is true that under the agreement for the purchase of Respondent Great Lakes, T. Wiers acquired a minority ownership interest in Respondent Great Lakes. T. Wiers' ownership interest in the Great Lakes facilities, in my view, goes more to the possibility of a "single-employer" relationship at the Great Lakes facilities where he and Respondent Great Lakes shared ownership, and not so much to the existence of such a relationship at the Wiers IT facilities, such as Plymouth, of which T. Wiers was the exclusive owner. In any case, T. Wiers' minority interest in the Great Lakes facilities was relatively small—it was not shown to have ever exceeded 6 percent—and is insufficient to establish meaningful common ownership at the Wiers IT facilities, such as the Plymouth dealership, where Respondent Great Lakes had no ownership interest at all. I conclude that consideration of the fourth factor also weighs against finding that Respondent Great Lakes and Wiers IT were operating as a single employer at the Plymouth facility.

For the reasons discussed above, I find that the four factors articulated by the Board do not support a finding that Respondent Great Lakes was responsible, as part of a "single employer" with Wiers IT, for unfair labor practices that may have occurred at the Plymouth facility. As Respondent Great Lakes argues, the evidence shows that the Plymouth dealership was owned and operated solely by T. Wiers and his company, Wiers IT. T. Wiers attempted to purchase Respondent Great Lakes, but failed. It would be unfair, as well as inconsistent with con-

sideration of the four factors discussed above, to hold Respondent Great Lakes responsible for unfair labor practices that were committed at the separately owned and operated Wiers IT facilities, simply because T. Wiers was, at the time, making an unsuccessful attempt to purchase Respondent Great Lakes.

Much the same considerations also lead me to conclude that Respondent Great Lakes and Wiers IT were not joint employers at the Plymouth facility. I note at the outset, that it is not clear that the General Counsel is contending that they were. In its brief, the General Counsel argues that Respondent Great Lakes and Wiers were joint employers at the Elkhart location and other Great Lakes facilities, but does make any explicit attempt to extend that argument to Wiers IT facilities such as the Plymouth dealership. Indeed, at the start of hearing, counsel for the General Counsel came close to conceding that Respondent was not a joint employer at the Plymouth facility, stating:

[O]ur position is [Respondent Great Lakes and Wiers IT] were clearly a joint employer, a single-integrated enterprise relationship there at the Elkhart facility. We're really open to the idea that there may not have been such a relationship at the Plymouth facility, which was owned by Wiers and solely run by Wiers to some extent. . . . we were open to the idea that the Plymouth facility may be found to be its own separate place that would not have joint liability as a joint employer with Great Lakes. [Tr. 10–11.]

Assuming that the General Counsel means to suggest that Respondent Great Lakes was a joint employer at the Plymouth location, I reject that contention. In determining whether a joint employer relationship exists, "the Board analyzes whether putative joint employers share or co-determine those matters governing essential terms and conditions of employment." *Airborne Express*, 338 NLRB 597 fn. 1 (2002). "The essential element in this analysis is whether the putative joint employer's control over employment matters is direct and immediate." *Id.* I conclude that Respondent Great Lakes did not control matters governing the terms and conditions of employment at the Plymouth facility. Those matters were within the sole discretion of T. Wiers acting in his capacity as the owner, president, and CEO of Wiers IT, of which the Plymouth dealership was part. The evidence does not show that in making decisions regarding such matters, T. Wiers sought the approval or involvement of the Great Lakes Board of Managers, considered the interests of Respondent Great Lakes, or acted in any capacity other than as the president, CEO, and owner of Wiers IT. Moreover, the purchase and bonus agreements that installed T. Wiers as president of Respondent Great Lakes limited the scope of his responsibilities as Great Lakes' president "100 percent" to the Great Lakes business.

I find that, as counsel for the General Counsel put it, "the Plymouth facility" was "its own separate place" that was not a "joint employer with Great Lakes."²⁷

²⁷ Given my finding that Respondent Great Lakes would not be liable for any violations at Wiers IT's Plymouth dealership under a "single employer" or a "joint employer" theory, and since the General Counsel was not proceeding against Wiers IT, it is not necessary for me to determine whether the violations alleged to have occurred at the Plymouth dealership were established. Those allegations were that

II. ALLEGED UNFAIR LABOR PRACTICES

A. Section 8(a)(1)

1. Interrogations

The complaint alleges that Respondent Great Lakes violated Section 8(a)(1) when T. Wiers and Hettich interrogated employees about union activities and membership. The evidence showed that in April and May 2007, during the pendency of the representation petition, T. Wiers and Hettich had numerous one-on-one meetings with employees about union matters. Both officials asked how employees thought the union election would turn out, and what employees thought the Union could do for them. During a number of these meetings, Hettich took his questioning further. He asked Burelison to reveal who was “in favor” of the Union and “who wasn’t.” Hettich also asked Reamer whether he was attending union meetings and whether he knew anyone else who was attending. Subsequently, Hettich told Reamer that he had heard a “vicious rumor” that Reamer was “for the Union,” and then asked, “Are you for the Union or for the Company?” When Reamer indicated that he supported the Union, Hettich said that if the Union came in “[i]t can only get worse.”

An interrogation is unlawful if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Matthews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292–293 (1990). Relevant factors include, whether the interrogated employee was an open or active union supporter, whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation. *Stoody Co.*, 320 NLRB 18, 18–19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177–1178 (1984), enfd. 760 F.2d 1006 (9th Cir. 1985). The Board has viewed the fact that an interrogator is a high-level supervisor as one factor supporting a conclusion that questioning was coercive. See, e.g., *Stoody*, supra.

Based on the factors articulated by the Board, I conclude that both T. Wiers and Hettich unlawfully interrogated employees. Both were high-level managers who oversaw multiple facilities, not just the Elkhart facility. T. Wiers was the president of the entire Great Lakes enterprise, not to mention its prospective owner. In his capacity as president he had authority to hire and fire employees at all of the Great Lakes facilities. Hettich, too, had authority to hire and fire employees at all the Great Lakes facilities and it was to him that the onsite managers at those facilities reported. These officials initiated one-on-one interviews with regular employees in order to question them about union matters. Neither T. Wiers nor Hettich claimed that they assured the interviewees that they could answer without fear of

reprisals and the witnesses’ accounts of the interrogations make no mention of any such assurances being given.

The record shows that T. Wiers and Hettich questioned not only open supporters of the Union, but nearly all of the Elkhart employees who would be voting in the upcoming election. Moreover, although Burelison and Reamer were open union supporters, the evidence showed that Hettich interrogated them about the union activities and sentiments of other employees. *Gardner Engineering*, 313 NLRB 755 (1994), enfd. in relevant part 115 F.3d 636 (9th Cir. 1997) (interrogation unlawful because, inter alia, official asked employee how he thought other employees would vote in upcoming election); *Cumberland Farms*, 307 NLRB 1479 (1992), enfd. 984 F.2d 556 (1st Cir. 1993) (interrogation of open union supporters unlawful where interviewers asked about the union activities/sentiments of other employees). In several instances, the officials interrogated employees about the Union immediately after T. Wiers held one of the mandatory group meetings at which he expressed his vehement opposition to unions and linked unionization to closure of the Elkhart facility. During the interrogation of Reamer, Hettich created a particularly hostile tone. He characterized information that Reamer supported the Union as a “vicious rumor” and demanded to know whether Reamer was “for the Union or for the Company.” Thus Hettich made clear that he viewed support for the Union as an act of disloyalty. When Reamer nevertheless stated that he supported the Union, Hettich responded by warning that if employees brought in the Union, things would not get better or stay the same, but “can only get worse.” See *Hoffman Fuel Co.*, 309 NLRB 327 (1992) (interrogation unlawful where it took place in context of hostile conversation and was coupled with veiled threat).

In addition, I conclude that T. Wiers and Hettich violated the Act by asking employees how they thought the union election would turn out and what good they thought the Union could do for them. The Board has found such questioning to be coercive and violative of the Act. See *Brooks Bros.*, 261 NLRB 876, 884 (1982), enfd. mem. 714 F.2d 111 (2d Cir. 1982) (violation where employer asked employee “how he thought the election would turn out”) and *Brookwood Furniture*, 258 NLRB 208, 214 (1981), enfd. 701 F.2d 452 (5th Cir. 1983) (violation where employer asked employee “how he thought the election would turn out” and “what good” he thought union would do). Respondent Great Lakes cites to no authority indicating that the prior precedent on this subject is not controlling here. Moreover, the conclusion that these questions were part of a coercive interrogation is buttressed by the other factors discussed above, including the identities of the questioners, the absence of proper assurances, and the hostile circumstances attending the interrogations.

I conclude that in April and May 2007, Respondent Great Lakes violated Section 8(a)(1) by coercively interrogating employees about their union sympathies and activities, and the union sympathies and activities of others.

2. Solicitation of grievances

The complaint alleges that on about April 25, 2007, T. Wiers and Mullennix solicited employee complaints and grievances and promised employees increased benefits and improved terms

Cripe—the Plymouth service manager—violated Sec. 8(a)(1) of the Act by prohibiting union discussions at the Plymouth facility and violated Sec. 8(a)(1) and (3) by discriminatorily disciplining and terminating Burelison.

and conditions of employment in an effort to discourage employee support for the Union.²⁸ An employer violates Section 8(a)(1) when it solicits, and promises to remedy, employee grievances as part of an effort to discourage union activity. *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1173 fn. 5 (2004); *Hospital Shared Services*, 330 NLRB 317 (1999); *Reliance Electric Co.*, 191 NLRB 44, 46 (1971), enf. 457 F.2d 503 (6th Cir. 1972). The promise to remedy grievances need not be explicit to constitute a violation. “There is a compelling inference that [the employer] is implicitly promising to correct those inequities he discovers as a result of his inquiries and likewise urging on his employees that the combined program of inquiry and correction will make union representation unnecessary.” *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992), enf. denied on other grounds 32 F.3d 588 (D.C. Cir. 1994), quoting *Reliance Electric*, 191 NLRB at 46.; see also *Evergreen America Corp.*, 348 NLRB 178, 210 (2006), enf. 531 F.3d 321 (4th Cir. 2008). This is particularly true when the solicitation of grievances is not a pre-existing practice. *Evergreen America*, supra; *Reliance*, supra.

After receiving the union petition, Respondent Great Lakes retained Mullennix as a consultant for the antiunion campaign. Hettich required every employee at the Elkhart facility to meet with Mullennix in hopes that Mullennix would find out what the employees’ complaints were and the Respondent could address those complaints. It is plain that this was a special effort to solicit complaints, not the Respondent’s preexisting practice. Indeed, Hettich conceded that the effort was motivated by the union campaign.

I conclude that in April or May 2007 the Respondent, through Mullennix, violated Section 8(a)(1) by soliciting, and impliedly promising to remedy grievances, in order to discourage employee support for the Union.

As discussed earlier, I conclude that T. Wiers and Hettich asked employees what they thought the Union could “do” for them as part of coercive interrogations that violated Section 8(a)(1). The General Counsel also alleges that by asking employees this question T. Wiers and Hettich were soliciting grievances in violation of Section 8(a)(1). After considering the record as a whole, I conclude that T. Wiers and Hettich did not pose this question to solicit grievances, but rather as part of the employer’s argument that the Union could not *do anything* positive for employees. This was a point that T. Wiers made repeatedly during his speeches at the mandatory group meetings. He stated that the only reason to support a union was the hope that the union would “get you something,” but that this was “like buying a raffle ticket, the chances of winning are minimal.” He stated that, if the Union prevailed in the election, employees should not “expect” improvements in wage benefits, pension benefits, or healthcare benefits.

²⁸ The complaint originally alleged such activity only by T. Wiers. At trial, I granted the General Counsel’s motion to amend the complaint to allege that Mullennix also participated in this activity. Tr. 195, 207–208. During some portion of Hettich’s testimony, he mistakenly used the name Ted Mullet when meaning to refer to Mullennix. All of the substantive testimony regarding conduct by Mullet actually refers to conduct by Mullennix.

I conclude that T. Wiers and Hettich did not unlawfully solicit grievances by asking employees what they thought the Union could do for them.

3. Threats

The complaint alleges that on about April 25, 2007, T. Wiers violated Section 8(a)(1) by threatening employees at the Elkhart facility with plant closure if the employees selected the Union as their collective-bargaining representative. The record evidence establishes that at the mandatory group meetings in April and May 2007, T. Wiers stated, inter alia: that the Elkhart facility was not profitable, that bargaining with the Union would increase costs, that all costs would further reduce the profitability and viability of the Elkhart facility, that no facility that was unprofitable would remain in business, and that the company had the right to determine whether the Elkhart facility was viable. He stated that the Union would not make the Elkhart facility profitable, and that it was up to “us . . . collectively management and employees” to make the facility profitable. Respondent Great Lakes denied the alleged threat in its answer to the complaint, but in its post-hearing brief makes no argument that T. Wiers’ statements did not constitute an unlawful threat.

Pursuant to the Supreme Court’s decision in *NLRB v. Gissel Packing Co.*, the question is whether T. Wiers’ statements constituted an unlawful threat of retaliation in response to protected activity, or a lawful, fact-based prediction of economic consequences beyond the employer’s control. 395 U.S. 575, 618–619 (1969). In *Gissel*, the Supreme Court stated that when an employer predicts dire economic effects stemming from union organization, such a prediction is lawful only if it is affirmatively supported “on the basis of objective fact to convey the employer’s belief as to demonstrably probable consequences beyond his control.” Id. at 618. “Conveyance of the employer’s belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof.” Id. at 618–619, quoting *NLRB v. Sinclair Co.*, 397 F.2d 157, 160 (1st Cir. 1968).

In the instant case, T. Wiers presented employees with no objective facts to support his assertion that the Elkhart facility was unprofitable or his prediction that having a union at the Elkhart facility would reduce the “profitability and viability” of that facility. Such unsupported assertions support finding an unlawful threat. See *Massachusetts Coastal Seafoods*, 293 NLRB 496, 510, 512 (1989) (statement by company official is an unlawful threat, not a lawful prediction, when the official gave no facts or figures to support prediction of economic effects of unionization). Moreover, T. Wiers did not present objective facts regarding the likely extent of costs associated with unionization, compare those costs to the size of the Elkhart operation’s budget, or otherwise show an objective basis for the prediction that such costs would be substantial enough to negatively affect the viability of the operation. If anything, T. Wiers exaggerated the costs likely to be associated with having a union at the Elkhart facility by including the \$20,000 that the Company had spent on legal fees—giving the impression that these were costs associated with having a union whereas, in

fact, they were nonrecurring costs that the Respondent voluntarily incurred to orchestrate its antiunion campaign. Nor did T. Wiers identify any objective facts to support his assertion that all expenditures reduce a company's profits and viability. In fact, businesses often make expenditures for improvements—on equipment, processes, materials, and personnel to give just some examples—that are more than offset by the resulting increases in revenues. T. Wiers cited no factual support for his prediction that the costs associated with collective bargaining at the Elkhart facility would not also be offset by resulting improvements—for example, in workforce stability, skill, experience, morale, and productivity. I conclude that Respondent Great Lakes has not shown that T. Wiers' prediction that the Elkhart facility would be rendered unviable by unionization was affirmatively supported "on the basis of objective fact to convey the employer's belief as to demonstrably probable consequences beyond his control." Those statements were not a lawful, fact-based prediction, but an unlawful threat of retaliation.

I recognize that the threat made by T. Wiers was veiled, but it was too thinly veiled to escape a finding of violation under the Act. As the Supreme Court noted in *Gissel*, the inquiry into whether an employer's statement about plant closure is an unlawful threat "must take into account the economic dependence of the employees on their employer, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." 395 U.S. at 617. Thus, the Board has found that statements similar to those made by T. Wiers were unlawful threats even if employees had to "pick up intended implications" in order to perceive the threat. In *Superior Coal Co.*, the Board held that the president of a coal company unlawfully threatened plant closure when he told employees that the coal business was competitive, that anything that drove the company's costs up would put the company in a noncompetitive position, and that if "we could not sell coal at a profit, we would not sell coal." 295 NLRB 439, 439 fn. 2 and 460–461 (1989). Similarly, in *Dominion Engineered Textiles*, the Board held that an employer made an objectionable threat when it stated that the creation of a collective bargaining obligation would consume time and energies that could be devoted to solving the company's problems and would be "devastating" to the company. 314 NLRB 571 (1994). In *McDonald Land & Leasing*, the Board found that the vice-president of a company unlawfully threatened employees by making statements implying that the company was financially on the ropes, that if the union won the election the company would be unable to meet the union's demands, and that disaster would result. 301 NLRB 463, 466 (1991). T. Wiers could easily have made his views known to employees without adding veiled threats of facility closure, but decided, as in the cases cited above, to engage in the type of "brinksmanship" that the Supreme Court has observed often leads employers to "overstep and tumble (over) the brink." *Gissel*, 395 U.S. at 620, quoting *Wausau Steel Corp. v. NLRB*, 377 F.2d 369, 372 (7th Cir. 1967).

For the reasons discussed above, I find that during the pendency of the representation petition, Respondent Great Lakes, by T. Wiers, violated Section 8(a)(1) by threatening that it would

close the Elkhart facility if employees selected the Union as their collective-bargaining representative.²⁹

The complaint also alleges that in about late April or early May 2007, Hettich violated Section 8(a)(1) by threatening employees at the Elkhart facility with lower wages and benefits if employees selected the Union as their collective-bargaining representative. The record shows that, during a conversation in late May 2007, Hettich told Reamer that he had "heard a vicious rumor" that Reamer was "for the Union." Hettich then asked Reamer whether he was "for the Union or for the Company?" When Reamer responded that he supported the Union, Reamer said: "[O]nly . . . three things can happen with the Union coming in here. One it can get better; two it can stay the same; or three, it can get worse. It's not going to get better and it's not going to stay the same. It can only get worse." An employer violates the Act when it makes a prediction to employees that they would necessarily lose benefits if they select a union when there is "no lawful explanation based on objective facts as to why such a loss of benefits would occur." *Poly-America, Inc.*, 328 NLRB 667, 669 (1999), *enfd.* in relevant part 260 F.3d 465 (5th Cir. 2001); see also *Dico Tire, Inc.*, 330 NLRB 1252, 1257 (2000) (employer threatens an employee in violation of the Act when it predicts that employees will lose benefits in negotiations if they select a union). The Respondent here has shown no objective basis for Hettich's prediction that things would "only get worse" as a result of collective bargaining, and therefore his statement constitutes a coercive threat, not a lawful prediction. Hettich's statement was particularly threatening when one considers that Hettich made it in response to Reamer's declaration of support for the Union and in the context of Hettich's coercive interrogation of Reamer.

I conclude that Respondent Great Lakes, by Hettich, violated Section 8(a)(1) in late May 2007 by threatening employees with worsened terms and conditions of employment if employees selected the Union as their collective-bargaining representative.

4. Promise of training and certification reimbursement

The complaint alleges that on or about May 3, 2007, T. Wiers violated Section 8(a)(1) by promising to reinstitute training and certification reimbursement benefits in order to discourage employee support for the Union. The evidence showed that, during the months immediately preceding the filing of the Union's petition, Respondent Great Lakes had not been reimbursing employees at the Elkhart facility for obtaining ASE training and CDL certification. Indeed, during the early part of 2007, the service manager at the Elkhart facility had on more than one occasion told employees that such a

²⁹ The complaint also alleges that in about late April or early May 2007, T. Wiers threatened employees with plant closure if the employees and the Union continued their organizing efforts. The brief of the General Counsel does not explain what facts are relied on for this allegation or how it differs from the other allegation of an unlawful threat of plant closure by T. Wiers. To the extent that it is based on statements that T. Wiers allegedly made to Reamer during a one-on-one conversation, for the reasons discussed above, I found that the record did not establish by a preponderance of the evidence that T. Wiers made those statements. Therefore, I recommend that this allegation, to the extent that it is independent of the other allegation regarding threats of plant closure, be dismissed.

benefit was not available. The failure of Respondent Great Lakes to provide this benefit was an issue of concern to employees and they brought it up to Mullennix when he unlawfully solicited their grievances and to T. Wiers during one of the mandatory group meetings regarding the Union. Then, while campaigning against the Union, T. Wiers announced that Elkhart employees would be reimbursed for ASE training and CDL certification.

In *NLRB v. Exchange Parts Co.*, the Supreme Court stated that an employer violates the Act by granting benefits “while a representation election is pending, for the purpose of inducing employees to vote against the union.” 375 U.S. 405, 409 (1964). The Court explained that Section 8(a)(1) “prohibits not only intrusive threats and promises but also conduct immediately favorable to employees which is undertaken with the express purpose of impinging upon their freedom of choice for or against unionization and is reasonably calculated to have that effect.” *Id.*; see also *Village Thrift Store*, 272 NLRB 572 (1983). The “employer’s legal duty in deciding whether to grant benefits while a representation proceeding is pending is to decide the question precisely as it would if the union were not on the scene.” *United Airlines Services, Corp.*, 290 NLRB 954 (1988). To determine whether an employer has met, or failed to meet, this legal duty, the Board considers whether all the evidence, including the employer’s explanation for the timing of the increase, supports “an inference of improper motivation and interference with employee free choice.” *Holly Farms Corp.*, 311 NLRB 273, 274 (1993), *enfd.* 48 F.3d 1360 (4th Cir. 1995), *affd.* 517 U.S. 392 (1996). Among the factors that may be considered to determine whether a preelection grant of benefit is unlawfully motivated are: the size of the benefit conferred in relation to the stated purpose for granting it; the number of employees receiving it; how employees reasonably would view the purpose of the benefit; the timing of the benefit, *Perdue Farms*, 323 NLRB 345, 352 (1997), *enfd.* in relevant part 44 F.3d 830 (D.C. Cir. 1998); the employer’s explanation for the timing of the benefit; prior statements by the employer indicating that the benefit would not be granted, *Lampi, L.L.C.*, 322 NLRB 502, 503 and 506 (1996), *Holly Farms Corp.*, 311 NLRB at 274; whether the grant of the benefit was consistent with the employer’s prior practice, *Lampi, L.L.C.*, 322 NLRB at 502, *Marine World USA*, 236 NLRB 89, 90 (1978); and the employer’s knowledge that the benefit involved was an important issue in the union organizing effort, *Huck Store Fixture Co.*, 334 NLRB 119, 123 (2001), *enfd.* 327 F.3d 528 (7th Cir. 2003).

I conclude that the evidence regarding T. Wiers’ decision to announce that Elkhart employees would be reimbursed for training and certification supports “an inference of improper motivation and interference with employee free choice.” The service manager at the Elkhart had, on more than one occasion, told employees that the Respondent would *not* provide this benefit to them. The record reveals no reason, other than the advent of the union campaign, for the Respondent’s change of heart on the subject. Moreover, the Respondent provides no explanation for its decision to time the announcement shortly before the representation election, rather than waiting until after

the vote was held.³⁰ The record shows that the Respondent knew, based on employee complaints to Mullennix and T. Wiers, that the failure to provide this benefit had emerged as a significant issue and source of discontent among employees. The benefit applied to all employees eligible to vote in the upcoming election, and such employees would reasonably view the announcement regarding the benefit as an effort by Respondent Great Lakes to show it was not necessary to elect a Union in order to obtain improvements in their terms and conditions of employment.

I conclude that Respondent Great Lakes violated Section 8(a)(1) when, during the pendency of the representation petition, it attempted to discourage employees at the Elkhart facility from supporting the Union by announcing that the Respondent would provide training and certification benefits that had previously been denied.

B. Section 8(a)(3) and (4)

1. Reinstitution of previously denied training and certification reimbursement benefit

The complaint alleges that, on or about May 3, 2007, Respondent Great Lakes violated Section 8(a)(1) and (3) of the Act by reinstituting training and certification benefits in order to discourage union support. As found above, during one of the mandatory group meetings, T. Wiers announced to employees that training and certification benefits, which employees at the Elkhart facility had previously been denied, would be provided to them. About a week later, Hettich began to distribute guides and training materials that were associated with this benefit. As discussed above, I found that, under the standards set forth by the Supreme Court in *Exchange Parts*, *supra*, Respondent Great Lakes violated Section 8(a)(1) by announcing these benefits for the purpose of inducing employees to vote against the Union. The same *Exchange Parts* standard applies to allegations that an employer unlawfully implemented the benefit in violation of Section 8(a)(1) and (3). In *Home Health, Inc.*, 334 NLRB 281, 284 (2001); *Perdue Farms*, 323 NLRB at 352–353. Therefore, for the same reasons that I found the announcement of the training/certification reimbursement benefits violated Section 8(a)(1), I find that by beginning to provide those previously denied benefits Respondent Great Lakes violated Section 8(a)(3).

I conclude that Respondent Great Lakes violated Section 8(a)(1) and (3) when, during the pendency of the representation petition, T. Wiers began to provide employees with previously denied training and certification benefits in order to discourage employee support for the Union.

2. Transfers

The complaint alleges that the transfers of Burelison, Bussey, and Reamer violated Section 8(a)(1) and (3) because the transfers were based on those employees joining and assist-

³⁰ Even when a benefit has been in the works and its approval shortly before an election is not itself unlawful, a violation has been found where the Respondent failed to establish a legitimate reason for timing the announcement before the election, rather than waiting to make the announcement afterwards. *American Red Cross*, 324 NLRB 166, 166 fn. 2 and 170–171 (1997).

ing the Union. With respect to Burelison and Bussey, the complaint further alleges that the transfers violated Section 8(a)(1) and (4) because the transfers were based on those employees testifying at a preelection hearing held by the Board. The Respondent counters that the transfers were lawfully motivated by a lack of work for service technicians at the Elkhart facility and that Burelison, Bussey, and Reamer were the ones selected because they had previously sought transfers and were the three least senior service technicians at the Elkhart facility.

In *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Corp.*, 462 U.S. 393 (1983), the Board set forth the standards for determining whether an employer has discriminated against an employee on the basis of union or other protected activity in violation of Section 8(a)(1) and (3). Under the *Wright Line* standards, the General Counsel bears the initial burden of showing that the Respondent's actions were motivated, at least in part, by anti-union considerations. The General Counsel may meet this burden by showing that: (1) the employee engaged in union or other protected activity; (2) the employer knew of such activities; and (3) the employer harbored animosity towards the Union or union activity. *Senior Citizens Coordinating Council*, 330 NLRB 1100, 1105 (2000); *Regal Recycling, Inc.*, 329 NLRB 355, 356 (1999). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected conduct. *Senior Citizens*, 330 NLRB at 1105.

Similarly, to establish a violation of 8(a)(1) and (4) the General Counsel must prove, by a preponderance of the evidence, that the Respondent's action was motivated, at least in part, by the employees' filing of charges or testifying. *Wayne W. Sell Corp.*, 281 NLRB 529 (1986). The 8(a)(4) violations turn on motivation and are analyzed using the *Wright Line* framework. *Newcor Bay City Division*, 351 NLRB No. 54, slip op. at 1 fn. 4 (2007); *McKesson Drug Co.*, 337 NLRB 935, 936 (2002).

Under the standards set forth above, I conclude that the General Counsel has met its initial burden under Section 8(a)(1), (3), and (4) with respect to Burelison and Bussey, and under Section 8(a)(1) and (3) with respect to Reamer. Burelison and Bussey testified as union witnesses at the preelection hearing held on April 20, 2007. This activity constituted both assistance to a labor organization and testimony under the Act, and therefore discrimination based on it would violate both Section 8(a)(3) and (4) of the Act. In addition, prior to their transfers, the alleged discriminatees engaged in a range of other activities which, under Section 8(a)(3), are unlawful bases for employment action. Burelison, Bussey, and Reamer all signed union authorization cards, attended union meetings, and expressed support for the Union to other employees. Bussey and Reamer placed pronoun stickers on their toolboxes where those stickers were visible to others in the Elkhart facility's shop area. Reamer also placed a pronoun bumper sticker on the vehicle that he used to drive to work and which he parked in the Elkhart facility's parking lot. While being interrogated by officials of the Respondent, all three alleged discriminatees either explicitly stated, or implied, that they supported the Union. When Hettich asked Reamer if he was "for the Union or for the Com-

pany," Reamer responded "I'm for the Union at this time." During an interrogation by T. Wiers, Bussey opined that the Union could benefit him by providing better benefits. Burelison answered questions posed by T. Wiers and Hettich by stating that employees wanted a union because of issues relating to insurance, pension, and quality of work life.

It is clear that Respondent Great Lakes was aware that the alleged discriminatees had engaged in protected activities at the time it transferred them from the Elkhart facility. Hettich was present at the preelection hearing when Burelison and Bussey testified on behalf of the Union. Shortly afterwards, Hettich approached Burelison to express his displeasure, stating that he was "surprised" to see Burelison at the hearing. Burelison, Bussey and Reamer made pro-union statements directly to T. Wiers and Hettich during interrogations. Indeed, neither T. Wiers nor Hettich denied knowing that all three alleged discriminatees supported bringing the Union to the Elkhart facility.

The record also shows that Respondent Great Lakes harbored animosity towards the Union and union activity. This is established by the Respondent's use of unlawful interrogations, threats, solicitations of grievances, and promises of benefits, in its effort to defeat the Union. Antiunion animus is also demonstrated by various statements that T. Wiers made to employees during the mandatory group meetings—for example, his statement that "[a]ny Union" is "a thorn in our side." A finding of employer animosity to employees' participation in the Board's processes is also supported by Hettich's comment to Burelison about his appearance as a witness.

Based on this record, I conclude that the antiunion animus was connected to the Respondent's decision to transfer Burelison, Bussey and Reamer. I note in particular, the timing of the transfers. T. Wiers transferred the three union supporters only three weeks before the scheduled elections and just a few days after both the rejection of the Respondent's effort to alter the unit definition and Reamer's declaration of support for the Union. Such timing is an important factor in assessing discriminatory motivation and in this case shows a link between the transfers and the employer's effort to defeat the Union. See *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2005), enfd. 232 Fed. Appx. 270 (4th Cir. 2007); *Desert Toyota*, 346 NLRB 118, 120 (2005); *Detroit Paneling Systems*, 330 NLRB 1170 (2000), enfd. sub nom. *Carolina Holdings, Inc. v. NLRB*, 5 Fed. Appx. 236 (4th Cir. 2001). Even Respondent Great Lakes' own labor attorney advised T. Wiers against transferring the three union supporters while the representation election was approaching. Given the small number of eligible voters—only eight as of May 13, 2007—T. Wiers certainly knew that eliminating three union supporters from the pool of eligible voters would significantly improve the Respondent's chances of defeating the Union in the upcoming vote. Thus, he decided to go ahead with the transfers against the advice of counsel and despite the blatancy of the discrimination. I find that the General Counsel has met the initial burden set forth in *Wright Line* for purposes of both Section 8(a)(3) and (4).

Since the General Counsel has met its initial burden, the burden shifts to Respondent Great Lakes to prove that it would have transferred Burelison, Bussey, and Reamer even in the

absence of the unlawful motives. Respondent Great Lakes contends that T. Wiers “decided, based upon the amount of work available, that he had to transfer or layoff three Technicians” and that the lack of work had warranted such an action since at least April 2007. (R. Great Lakes Br. at 6.) The Respondent further contends, that T. Wiers lawfully selected Burelison, Bussey, and Reamer for the transfers because: (1) they had the least seniority with Respondent Great Lakes of any of the service technicians at the Elkhart facility; and (2) Bussey and Reamer had requested transfers in the past.

After considering the record evidence, I conclude that the explanations that Respondent Great Lakes offers for transferring the three union supporters are pretexts for unlawful discrimination. As discussed above, the Respondent has not established that the Elkhart facility was lacking work for the service technicians. Indeed, its own figures for the Elkhart facility show a generally upward trend both in sales dollars for the work of service technicians and the total number of hours worked by service technicians there. Any lingering doubt concerning this issue is dispelled by consideration of the fact that Respondent Great Lakes decided to transfer Morton—a service technician who had been with T. Wiers since 1994—to the Elkhart facility just a few weeks before it transferred the three union supporters away from the Elkhart facility. If, since April, the Respondent lacked sufficient work for Elkhart service technicians then why did it transfer a service technician to that facility at the beginning of May? Respondent Great Lakes provides no explanation. Given the rapidly approaching representation election, and in light of the small number of employees who would be voting, the Respondent’s decision to transfer a trusted employee of T. Wiers to the Elkhart facility at virtually the same time that it transferred three union supporters away from that facility leads me to conclude that the transfers were not the result of a shortage of work at the Elkhart facility, but rather the product of an effort to manipulate the pool of eligible voters to engineer a “no” vote.

Even assuming that there was a shortage of work at the Elkhart dealership, I conclude that the Respondent has not succeeded in showing that Burelison, Bussey, and Reamer would have been the ones selected for transfer had it not been for their union support and other protected activity. As discussed in the factual findings above, the evidence does not support the Respondent’s contention that any of the three alleged discriminatees requested transfers from the Elkhart facility and certainly does not show that T. Wiers and Hettich were motivated by the belief that any of the three would welcome the transfers. Indeed, the record shows that all three were transferred against their wishes and, in Reamer’s case, in contravention of the policy, previously stated by Hettich, against allowing members of the same family to work together.

I also conclude that Respondent Great Lakes has failed to substantiate its contention that Burelison, Bussey, and Reamer were selected for transfer because they had the least seniority among the Elkhart service technicians. First, as discussed above, the Respondent has not established that the alleged discriminatees, in fact, had the least seniority. That is a distinction the record indicates belonged to Morton, who had begun working for Respondent Great Lakes after Burelison, Bussey, and

Reamer. Moreover, Respondent Great Lakes did not introduce evidence showing that it had ever before used seniority as a factor in transfer decisions or that there was a policy or practice of doing so.³¹ Indeed, the Wiers IT employee handbook that the employer distributed to Elkhart employees in April 2007 includes a policy on transfers, and while that policy sets forth a number of factors that influence transfer decisions, it does not include seniority as one of those factors. See footnote 22, *supra*. Assuming that seniority was a factor that Respondent Great Lakes considered when deciding whether to honor an employee’s transfer request, one would expect it to first accommodate employees who had worked with the company the longest rather than skipping over such loyal employees to reward the most recently hired ones.

For the reasons discussed above, I conclude that in May 2007 the Respondent Great Lakes discriminatorily transferred Burelison and Bussey from the Elkhart facility because of their union and other protected activities and their participation in the Board’s processes, and for the purpose of discouraging such activities, in violation of Section 8(a)(1), (3), and (4) of the Act.

In addition, I find that in May 2007 the Respondent Great Lakes discriminatorily transferred Reamer from the Elkhart facility because of his union and other protected activities, and for the purpose of discouraging such activities, in violation of Section 8(a)(1) and (3) of the Act.³²

III. CHALLENGED BALLOTS

The Employer challenged the ballots cast by Burelison, Bussey, and Reamer on the grounds that those individuals were not employed in the bargaining unit on the date of the June 19, 2007 representation election. It is undisputed that all three were eligible to vote prior to being transferred in late May 2007. As found above, those transfers were unlawfully based on the employees’ union and other protected activities, and their participation in board proceedings. The Board consistently overrules challenges to ballots cast by employees who, but for unlawful discrimination, would have been eligible to vote in the election. *LaGloria Oil & Gas Co.*, 337 NLRB 1120, 1137 (2002), *affd.* mem. 71 Fed. Appx. 441 (5th Cir. 2003); *Firmat Mfg. Corp.*, 255 NLRB 1213, 1225 (1981), *enfd.* mem. 681 F.2d 807 (3d Cir. 1982); *Gossen Co.*, 254 NLRB 339, 367 (1981), *enf. granted in part, denied in part* 719 F.2d 1354 (7th Cir. 1983); and *F&M Importing Co.*, 237 NLRB 628, 632 (1978). Since the challenged ballots were cast by three individuals who would have been eligible voters if not for the unlawful discrimination against them, I overrule objections to their ballots.

For the reasons discussed above, Burelison, Bussey, and Reamer were eligible to vote in the June 19, 2007 election and the Employer’s objections to their ballots are overruled.

³¹ Unwritten policies are a ready means of discrimination and are suspect. See *Planned Bldg. Services*, 347 NLRB 670, 716 (2006); *Kentucky General, Inc.*, 334 NLRB 154, 161 (2001); *Sioux City Foundry*, 241 NLRB 481, 484 (1979).

³² For the reasons discussed above, I do not reach the question of whether the discipline and termination of Burelison, which occurred during his employment by Wiers IT, violated Sec. 8(a)(1), (3), and (4) of the Act. See *supra*, fn. 27.

IV. EMPLOYER IDENTITY

The order directing a hearing on the consolidated unfair labor practices and representation cases states that the administrative law judge will “determine the name of the employing entity” relevant to the representation election. In its brief, the Union asks that I direct the Region to name Respondent Great Lakes as the Employer on the certification of the election. The Union states that, at all relevant times, Respondent Great Lakes has owned the Elkhart facility and that employees there were working for Respondent Great Lakes. In its brief, Respondent Great Lakes agrees, stating that it was the employer of all employees at the Elkhart facility during the time period relevant to this adjudication. The record evidence supports the shared understanding of the Union and the Respondent. Moreover, at the time of the hearing, Respondent Great Lakes continued to own and operate the Elkhart facility.

I conclude that Respondent Great Lakes has, at all relevant times, been the employing entity at the Elkhart facility, and I will direct that the Region identify Respondent Great Lakes as the Employer on the certification of election.

CONCLUSIONS OF LAW

1. Respondent Great Lakes is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. During the relevant time period, Respondent Great Lakes was not the employer, a joint employer, or part of a single-employer/single integrated business enterprise at the Wiers IT facility in Plymouth, Indiana.

4. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (4), and Section 2(6) and (7) of the Act.

5. Respondent Great Lakes interfered with employees’ exercise of their Section 7 rights in violation of Section 8(a)(1) of the Act by: coercively interrogating employees about their union sympathies and activities, and the union sympathies and activities of others; soliciting and impliedly promising to remedy grievances in order to discourage employees from supporting the Union; threatening employees with facility closure if the employees selected the Union as their collective-bargaining representative; threatening employees with worsened terms and conditions of employment if employees selected the Union as their collective-bargaining representative; and announcing that it would provide previously denied benefits for the purpose of discouraging employees from supporting the Union.

6. Respondent Great Lakes violated Section 8(a)(1) and (3) of the Act when, during the pendency of the representation petition, it began to provide employees with previously denied benefits for the purpose of discouraging employee support for the Union.

7. Respondent Great Lakes violated Section 8(a)(1), (3), and (4) of the Act by discriminatorily transferring employees Timothy Burelison and John Bussey because of their union and other protected activities and their participation in the Board’s processes, and for the purpose of discouraging such activities.

8. Respondent Great Lakes violated Section 8(a)(1) and (3) of the Act by discriminatorily transferring employee Eric Reamer because of his union and other protected activities, and for the purpose of discouraging such activities.

9. Timothy Burelison, John Bussey and Eric Reamer were eligible to vote in the June 19, 2007 representation election and the Employer’s objections to their ballots are overruled.

10. Respondent Great Lakes has, at all relevant times, been the employing entity at the Elkhart, Indiana facility.

REMEDY

Having found that Respondent Great Lakes has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act. Respondent Great Lakes, having discriminatorily transferred Burelison, Bussey, and Reamer must make the discriminatees whole for any resulting loss of earnings and other benefits, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Since Burelison’s transfer to the Wiers IT facility in Plymouth, Indiana, meant the end of his employment by Respondent Great Lakes, that transfer should be treated as a discharge for purposes determining backpay and any other make-whole relief.

The General Counsel urges that the Board’s “current practice of awarding only simple interest on backpay and other monetary awards should be replaced with the practice of compounding interest.” (GCI Br. at 47.) The Board has considered, and rejected, this argument for a change in its practice. See *Rogers Corp.*, 344 NLRB 504 (2005), citing *Commercial Erectors, Inc.*, 342 NLRB 940 fn. 1 (2004); and *Accurate Wire Harness*, 335 NLRB 1096 fn. 1 (2001), enfd. 86 Fed. Appx. 815 (6th Cir. 2003). If the General Counsel’s argument in favor of compounding interest has merits, those merits are for the Board to consider, not me. I am bound to follow Board precedent on the subject. See *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993); *Lumber & Mill Employers Assn.*, 265 NLRB 199 fn. 2 (1982), enfd. 736 F.2d 507 (9th Cir. 1984), cert. denied 469 U.S. 934 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F.2d 1017 (9th Cir. 1981).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³³

ORDER

The Respondent, Great Lakes International Trucks, LLC, Elkhart and South Bend, Indiana, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about their union support or union activities.

³³ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Coercively interrogating employees about the union support or union activities of other employees.

(c) Soliciting and impliedly promising to remedy grievances in order to discourage employees from supporting the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL-CIO (the Union).

(d) Threatening employees with facility closure if the employees select the Union as their collective-bargaining representative.

(e) Threatening employees with worsened terms and conditions of employment if employees select the Union as their collective-bargaining representative.

(f) Announcing that it will provide any previously unavailable benefit for the purpose of discouraging employees from supporting the Union.

(g) Implementing any previously unavailable benefit for the purpose of discouraging employees from supporting the Union.

(h) Transferring or otherwise discriminating against any employee for engaging in union or other protected activities.

(i) Transferring or otherwise discriminating against any employee for testifying in a Board proceeding or otherwise participating in the Board's processes.

(j) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Timothy Burelison, John Bussey, and Eric Reamer reinstatement to their former jobs at the Elkhart facility or, if those jobs no longer exist, to substantially equivalent positions at the Elkhart facility, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Timothy Burelison, John Bussey, and Eric Reamer whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful transfers, and within 3 days thereafter notify Timothy Burelison, John Bussey, and Eric Reamer in writing that this has been done and that the transfers will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Elkhart, Indiana, copies of the attached notice marked "Appendix."³⁴ Copies of the notice, on forms provided by the

Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 25, 2007.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 25 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballots of Timothy Burelison, John Bussey, and Eric Reamer in Case 25-RC-10389. The Regional Director shall then prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

IT IS FURTHER DIRECTED that the Regional Director shall identify Great Lakes International Trucks, LLC, as the employing entity on the certification of election.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT coercively question you about the union support or activities of other employees.

³⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT solicit, and impliedly promise to remedy, your grievances in order to discourage you from supporting the International Union of Operating Engineers, Local 150, a/w International Union of Operating Engineers, AFL-CIO (the Union).

WE WILL NOT threaten that we will close any facility if employees select the Union as their collective-bargaining representative.

WE WILL NOT threaten you with worsened terms and conditions of employment if employees select the Union as their collective-bargaining representative.

WE WILL NOT announce that we will provide previously unavailable benefits for the purpose of discouraging you from supporting the Union.

WE WILL NOT implement previously unavailable benefits for the purpose of discouraging you from supporting the Union.

WE WILL NOT transfer or otherwise discriminate against you for engaging in union and other protected concerted activities.

WE WILL NOT transfer or otherwise discriminate against you for testifying in a Board proceeding or otherwise participating in the Board's processes.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Timothy Burelison, John Bussey, and Eric Reamer full reinstatement to their former jobs at the Elkhart facility or, if those jobs no longer exist, to substantially equivalent positions at the Elkhart facility, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Timothy Burelison, John Bussey, and Eric Reamer whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful transfers of Timothy Burelison, John Bussey and Eric Reamer, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the transfers will not be used against them in any way.

GREAT LAKES INTERNATIONAL TRUCKS, LLC